THE
CALCUTTA LAW JOURNAL

REPORTS OF CASES,

DECIDED
BY THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL ON APPEALS
FROM INDIA,
BY THE FEDERAL COURT
AND
BY THE HIGH COURT OF JUDICATURE AT
FORT WILLIAM IN BENGAL.

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JUDGES OF THE HIGH COURT

1940.

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Chief Justice.

The Hon'ble Sir Harold Derbyshire, Kt., M.C., K.C.

Puisne Judges.

The Hon'ble Mr. Justice	J. Lort-Williams, Kt., K. C.
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"	T. J. Y. Roxburgh, C. I. E., I. C. S. (*Addl.*)
"	A. S. M. Akram, (*Addl.*)

Advocate-General.

Sir Asoke Kumar Roy, Kt.

Senior Standing Counsel.

Mr. J. N. Mazumdar.

Senior Government Pleader.

Dr. S. C. Basak, M.A., D.L.

EDITORS.

Ashutosh Mukerji, M. A., B. L.

Ramendra Mohan Majumdar, M. SC., B. L.

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Adoption—Ambastha—*Adoptive father Sudra—Appellate Court—Testimony of witnesses—Believing witnesses—Custom—Muslim law of pre-emption—Applicability to Hindus of Sylhet.*

In a case involving a question of fact the decision of which depends on the reliance to be placed on the testimony of witnesses, the view of the Judges who tried the case and saw the witnesses is entitled to great weight.

Where the only question is which set of witnesses is to be believed the finding of the trial Judge should not be lightly regarded on a mere calculation of probability by the Court of appeal.

In this case, having regard to the facts and circumstances that even if the ancestor of defendant No. 1's father was Ambastha or Vaishya his family had degenerated and degraded to Sudradom and defendant No. 1

Court of Wards—*Proprietors of estate declared incapable of managing their property—Declaration by Local Government that interest on debts exceeds "gross annual profits" of property—Meaning—Land Revenue to be deducted in computing gross annual profits—Declaration not challengable in Civil Courts—United Provinces Court of Wards Act (No. IV of 1912), sections 8, 10, 11.*

By section 8 of the the. United Provinces Court of Wards Act, 1912, "(1) Proprietors shall be deemed to be disqualified to manage their own property when they are..............(d) persons declared by the Local Government to be incapable of managing or unfitted to manage their own property...........(iii) owing to their having entered upon a course of extravagance ; (iv) owing to their failure without sufficient reason to discharge the debts and liabilities due by them : Provided that no such declaration shall be made under sub-clause (iii) or (iv) unless the Local Government is satisfied—(a) that the aggregate annual interest payable at the contractual rate on the debts and liability due by the proprietor exceeds one-third of the gross annual profits of the property............"

By section 11 "No declaration made by the Local Government under section 8 or by the Court of Wards under section 10 shall be questioned in any Civil Court."

In arriving at the "gross annual profit" of a property for the purposes of section 8, the amount of land revenue payable must be deducted, but no allowance must be made for any expenses of managing the estate.

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Hindu widow—*(Contd.)* :

would happen in the case of her natural death and the next heir steps into the inheritance as a matter of law without any act of consent or acceptance on his part. The fact that the immediate reversioners are female heirs who take only a limited interest in the property does not make any difference, and a surrender in favour of such limited heirs is equally effective though the interest which they take in the property is not thereby enlarged.

Per Nasim Ali, J.: Under Hindu law, a Hindu widow in possession of her husband's estate can relinquish, and by relinquishing anticipate for the reversioners their period of succession. The acceleration does not depend upon the consent of the immediate reversioner. Where the immediate reversioner is a male, the accelerated interest vests in him absolutely and can deal with it as he likes. Where the immediate reversioner is a female and the accelerated interest is the interest of a limited owner, she can only deal with her limited interest. She cannot by her dealing affect the interest of the actual reversioners unless by her consent she effaces her own limited interest and thereby accelerates the absolute interest of the second male reversioner.

The second part of the rule in the case of *Protap Chander Roy Chowdhury* v. *Sreemutty Joy Monee Dabee Chowdhrain* cannot be extended to the consent of immediate reversioners being females, unless their consent amounted to an effacement of their life interest or surrender according to Hindu law except an alienation for legal necessity and thereby destroy the interest of actual owners.

Per Mukherjea, J.: A widow can, with the consent of her daughter, who is the next heir of her husband, relinquish the estate in favour of daughter's son. But consent given by her must show an intention to efface her own interest completely and circumstances must be such as would entitle the Court to construe the transaction as amounting in substance to a relinquishment by the widow in favour of her daughter and a second surrender by the latter in favour of the next male heir. If the daughter who joins with the mother in the act of surrender reserves for herself as a consideration for the same a substantial part of the property which she is also presumed to surrender, or stipulates for any benefit to her save and except what is necessary for her maintenance, the transaction might amount to a transfer of her own life interest for consideration, but that could not give the reversioner in whose favour the surrender is made an absolute interest in the estate to the prejudice of the actual reversioner at the time of her death :

Maintenance need not be provided in the shape of a periodical pecuniary allowance and there is nothing in law which prevents the surrendering female heir from taking a portion of the immovable property or a lump sum at once for purposes of maintenance provided it is not unreasonable.

A surrendering female heir can always reserve for herself a right to be

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Jurisdiction—*(Contd.)* :

power—Alteration of correct decree or certificate—Happening of subsequent event—Vacating certificate—Appeal, when not entertainable by Federal Court—Jurisdiction of Federal Court, if can be divested in favour of Privy Council—Interest pendente lite.

The granting of a certificate is the necessary condition precedent to the exercise of its jurisdiction by the Federal Court.

There is no inherent power to alter a decree or a certificate, which was correct at the time when it was made or given, because of the happening of some subsequent event.

If the High Court had no power to vacate its certificate, the Federal Court has no power to do so.

The Federal Court will not entertain appeals which have no relation to existing rights created or purported to be created or to express opinions on subjects which are no longer of any practical interest.

When jurisdiction to hear an appeal is once vested in the Federal Court by the grant of a certificate, it cannot be divested by any subsequent event ; e. g., by the action of a Provincial Legislature.

Once a certificate has been granted, an appellant can appeal on any ground whatsoever, if the Court thinks fit to give him leave to do so.

Obiter : The jurisdiction of Federal Court to entertain the appeal on those other grounds would not be excluded even if an appellant declined to argue before the Federal Court that the decision of the High Court on the constitutional question with respect to which the certificate had been granted was wrong.

The date of the judgment of the High Court and of their certificate was 17th January, 1939. On 1st May, 1939, the Bihar Money-lenders (Regulation of Transactions) Act, 1939, came into force. The application of the appellant to the High Court for admission of their appeal to the Federal Court was made on the 11th May and the appeal was finally admitted by the High Court on the 2nd October, 1939. The Act of 1939 repealed and re-enacted section 11 of the Bihar Money-lenders Act, 1938. The certificate under section 205(1) granted on the 17th January, 1939, certified that the case involved a substantial question of law as to the interpretation of the Constitution Act, that question being whether section 11 of the Bihar Money-lenders Act, 1938, was void under section 107 of the Constitution Act, because repugnant to an existing Indian law, namely section 2 of the Usury Laws Repeal Act, 1855, section 3 of the Usurious Loans Act, 1918, and also section 37 of the Indian Contract Act, 1872 :

Held, that though the question of law as to the validity of section 11 ceased to exist at the beginning of May, when the new Act of 1939 came into force, as the Act was retrospective, the Federal Court and not the Privy Council had jurisdiction to hear the appeal. The certificate granted by the High Court on 17th January, 1939, conferred jurisdiction to hear the appeal and that jurisdiction had not been taken away from the Federal Court by reason of the alteration of cir-

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Suit for declaration—*Will, construction of—Absolute estate subject to repugnant condition—Civil Procedure Code (Act V of 1908), O. 2 R. 2—Same cause of action—Decree, if to be registered—Registration Act (III of 18,7), Section 17 (i)—Compromise, recording of—Reference of compromise in decree—Compromise not recited in decree—Civil Procedure Code (Act XIV of 1882), Sec 375.*

Ishar Singh on 19th September, 1905, made a Will. By his Will he declared himself to be the absolute and exclusive owner of the property which he disposed of thereby. He made the following dispositions in favour of his wife ;

"4............My wife is Musammat Bishan Devi............I make this Will in her favour that she shall be exclusive owner of the following properties after my death.

"(a) Entire cash including pro-notes for Rs. 13,000 and other items.

"(b) Liquor............

"(c) Land, situate in Nathe.

"(d) Lands, situate in Lyallpur.

"(e) Three-quarter share in Nowshahra property.

"(f) All ornaments.

"........................My wife, Musammat Bishan Devi, may manage the said property in whatever way she likes. She shall have all kinds of powers to deal with the property aforesaid. She shall be considered full owner..................

"7. After the death of my wife.........whatever property remains shall be owned by the sons of Sundar Singh.........Besides, my wife............shall not be entitled to sell immoveable property. The sons of Sundar Singh shall also have no such right.

"8. The remaining moveable or immoveable property of mine shall be exclusively owned by my wife." :

Transfer—*Code of Criminal Procedure (Act V of 1898), section 192, sub-section (1)—Transfer of a case—Piecemeal transfer—Clear indication in the order of the transfering Magistrate—Power of Magistrates—Cognisance of a matter—Transfer of cases by Sub-divisional Magistrates—Scope of such transfer—Code of Criminal Procedure (Act V of 1898), sections 202, 528, 530 and Chapters VII, XII, XVIII, XX, XXI.*

When a case has been transferred to a Magistrate under section 192, sub-section (1) of the Code of Criminal Procedure, that Magistrate has the same authority to deal with the case which has been transferred to him, as regards the issuing of the processes and other matters connected with the inquiry or trial, as is vested in the Superior Magistrate from whom he received the case.

Although piecemeal transfer of a case is in certain circumstances valid, that portion of the case which has not been transferred must be clearly stated in the order of transfer recorded by the transfering Magistrate who acts under section 192 of the Code of Criminal Procedure. In the absence of clear indication as to which part of the case has been retained on the file of the transfering Magistrate or some further indication to the effect that such Magistrate intended to dismiss the complaint against those accused persons in respect of whom he did not issue process, it must be taken that the whole case has been transferred to the Subordinate Magistrate, not only against the accused persons actually summoned but against all other persons whom the Subordinate Magistrate might consider to be implicated in the offence.

The Magistrate to whom a case is transferred under section 192 of the Code of Criminal Procedure must be empowered to try it, otherwise the trial will be void under section 530 of the Code of Criminal Procedure.

Section 192, sub-section (1) refers not merely to taking cognisance of offences of which cognisance has been taken and the language used is wider in character than that which had been employed in section 190, sub-section (1).

Therefore cognisance may be taken by a Magistrate of any matter in respect of which an enquiry or trial may be held under the provisions of the Code of Criminal Procedure.

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Ultra vires—*(Contd.)* :

or List III, Schedule VII of the Constitution Act—Entry in No. 21 of List II, interpretation of—" Remission of rent "—Regularisation of Remissions Act, section 2—Civil Procedure Code, sections 4, 9—Constitution Act, section 299(3)—Retrospective operation, if applicable to pending action—Statutes, interpretation of—Decree.

Per Curiam : The High Court has jurisdiction in second appeal to implead the United Province on its application as party to the appeal between private persons when the validity or constitutionality of the provincial legislation is in issue and as such party it can prefer an appeal to the Federal Court (in the absence of any anpeal by the parties).

The Regularization of Remissions Act, 1938 was within the sphere allotted to the Provincial Legislature by the Government of India Act, 1935, it was not opposed to section 292 of the said Act of 1935 and was *intra vires* of the United Provinces Legislature.

Per Sulaiman, J. : The Regularization of Remissions Act, 1938 does not apply to the appeal pending before the High Court.

Per Curiam : As the United Provinces was the only appellant and was not interested in any way in the original dispute between the parties, save to uphold the validity of a particular law which had been challenged in the course of the proceedings, the Federal Court at the instance of third party who had no direct interest in the original suit, to order the High Court to vary the decree which it gave as between plaintiffs and defendant.

Per C. J. : The learned C. J. was of opinion that the party should not have been the Province itself ; that if the Government of the Province desired to uphold the validity of a Provincial Act or to challenge that of a Federal Act, it should direct the Advocate-General of the Province to intervene on its behalf and as intervenor it could not appeal to the Federal Court.

The Advocate-General of the Province is a proper party in the sense that without him the Court cannot effectually and completely adjudicate upon and settle all the questions as to validity of impugned Act involved in the suit.

Per Sulaiman, J. : When in a suit between a landlord and his tenant, the validity of an Act of the Provincial Legislature is in question, the Provincial Government is a proper party to be impleaded as his presence is necessary for an effectual or complete adjudication, though indirectly interested in such an adjudication and the Government were interested to the further extent that the effect of the High Court's ruling would be to nullify certain orders previously issued by the Government, the enforceability of which was indirectly attempted by the U. P. Regularization of Remissions Act.

Order 41, Rule 20, Civil Procedure Code, 1908, is not exclusive or exhaustive and does not deprive a Court of any inherent power which it may possess and can exercise in special circumstances, and which has been saved by section 151 of the said Code.

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Ultra vires—*(Contd.)* :

In pith and substance the Regularization of Remissions Act, 1938, is an Act not only with respect to the relation of landlord and tenant or the collection of rents, but is also with respect to conferring on the Provincial Government very extensive powers of interference with the legal rights of land-holders within the exclusive authority of the Provincial Legislation.

Per C. J. : The Regularization of Remissions Act, 1938, is with respect to remission of rents, although it may be an Act with respect to something else, that is to say, the validation of doubtful executive orders. Legislation for validation of executive orders is subsidiary or ancillary to the power of legislating on the particular subjects in respect of which the executive orders may have been issued.

Per Sulaiman, J. : It is an Act not only with respect to the relation of landlord and tenant or the collection of rents, but also with respect to conferring on the Provincial-Government very exclusive powers of interference with the legal rights of land-holders in their lands. This comes within No. 21 of List II. Even if the impugned Act were indirectly with respect to assessment of revenue, it will fall within entry No. 39 and be still in List II.

Per Varadachariar, J.: Section 2 of the impugned Act had a two-fold operation : on the one hand it prevented the landlord from questioning the order of remission with a view to receiving the full rent ; on the other, it might also be held to prevent the Court *suo motu* from questioning the order of remission.

Per C. J. & Sulaiman, J. : As assent of the Governor was later given, the Regularization of Remissions Act, 1938 is not void under section 299(3) of the Government of India Act, 1935.

Per C. J. : The Regularization of Remissions Act, 1938, is not in conflict with sections 4 and 9 of the Code of Civil Procedure.

Per Sulaiman, J. : Even if there were mere repugnancy, the impugned Act would under section 107(1) of the Constitution Act be void only to the extent of repugnancy. Section 9 of the Code of Civil Procedure cannot stand in the way of its applicability to a revenue case.

The impugned Act not being repugnant to any of the provisions of the Code of Civil Procedure, it does not fall under entries Nos. 4 and 15 of List III, Schedule VII of the Constitution Act.

Per Sulaiman, J. : An Act may in its operation be retrospective, and yet the extent of its retrospective character need not extend so far as to affect pending suits. Courts have leaned very strongly against applying a new Act to a pending action, when the language of the statute does not compel them to do so.

The statutes should, as far as possible, be so interpreted as not to affect vested rights adversely, particularly when they are being litigated. When a statute deprives a person of his right to sue or affects the power or jurisdiction of a Court in enforcing the law as it stands, its retrospective character must be clearly expressed. Ambiguities in it should not

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NOTES OF CASES.

Emperor v Fateh Singh.

Criminal Procedure Code (Act V of 1898), section 181 (2)—Forum of trial for criminal breach of trust. 1939. I. L. R. [1940] All. 43.

Fateh Singh, a mill agent, who was liable only to render accounts at the mill premises in Meerut, did not pay the money due to the mill collected by him at his office in Amritsar. He was tried at Meerut for criminal breach of trust. On revision :

Held [per *Mulla J.*]—that the Court at the place of accounting alone, where delivery of money or property was not required, has no jurisdiction to try the accused for such an offence.

S. C.

Zujya Pascol Damel v. Manmohandas Lalubhai Pratap.

Negotiable Instruments Act (XXVI of 1881), section 8. 1939. I. L. R. [1940] Bom. 153.

A pronote executed by Damel to a Hindu joint family firm was allotted to Manmohandas after partition, whose suit thereon was decreed by the lower Courts. On second appeal :

Held [per *Wassoodew* and *Indarnarayen, JJ.*]—that though the pronote was in favour of a firm yet such a suit by Manmohandas personally was maintainable.

S. C.

Bai Lalita *v.* The Tata Iron and Steel Company Ltd.

1939.
I. L. R. [1940] Bom. 165.

Arrears of dividend, if a debt—Income-tax Act (XI of 1922), sections 14, 19, 20, 22, 28—Limitation Act (IX of 1908) Arts. 116, 120.

Lalita, a holder of second preference shares, sued the company on 1st October, 1936, for the balance (after receiving part payment) of arrears of dividends from 1st April, 1922 to 31st March, 1926, free from income-tax as no such tax was paid by the company prior to 1934-35:

Held [per *Beaumont C. J.*, *Broomfield* and *Kania JJ.*]—that arrears of dividends are not debts, that an action for recovery of the balance due, after part payment, of a declared dividend is an action for debt covered by article 116 or 120 and so the plaintiff's claim prior to 1930-31 was time-barred and that the Company can deduct income-tax from dividends under contractual obligations, if any, only if it pays the same.

S. C.

Abdul Latif Gulam Nabi Patil *v.* Shrimant Sarkar Jawhar State.

1939.
I. L. R. [1940] Bom. 225.

Code of Civil Procedure (Act V of 1908), section 85, Order 3 rule Defect in suit by an unauthorised agent not cured by subsequent authority.

A suit on behalf of Jawhar State filed by an agent not authorised under Order 3 rule 2 and without the authority required under section 85 was dismissed by the trial Court as also by appellate Court where the requisite authority was produced but was decreed in second appeal. On Letters Patent appeal:

Held [per *Wassoodew* and *Indarnarayen JJ.*]—that the suit was defective and that the defect was not cured by subsequent authority.

S. C.

Subhas Chandra Bose *v.* Gordhandas I. Patel.

Indian Succession Act (XXXIX of 1925), sections 138, 139—Construction of Will. 1939. I. L. R. [1940] Bom. 254

Mr. V. J. Patel made a Will at Glad, Switzerland on 2nd October, 1933, and died there 20 days later. The 5th clause recites—"The balance of my assets after disposal of the abovenamed four gifts is to be handed over to Mr. Subhas Chandra Bose (son of Janaki Nath Bose) of 1 Woodburn Park, Calcutta, to be spent by the said Mr. Subhas Chandra Bose or by his nominee or nominees according to his instructions for the political uplift of India and preferably for public work on behalf of India's cause in other countries." B. J. Wadia J. held on construction that clause 5 did not constitute an absolute bequest nor a valid charitable trust and hence there was intestacy to the property in that clause. On appeal:

Held [per *Beaumont C. J.*, and *Kania J.*]—that the words "to be handed over to ...." together with the directions in clause 5 constitute a trust and not a beneficial gift, that section 138 is inapplicable, that the meaning of the words "political uplift of India" was too vague to be enforced by Court and hence there was intestacy to the residue in the said clause.

S. C.

In re. David Sassoon & Co. Ltd.

Indian Income-tax Act (XI of 1922), section 10 (2) (vi), Prov. (b), 24, 26(2)—Assignee liable. 1939. I. L. R. [1940] Bom. 287.

The company assigned a mill working at a loss to another company on 1st January, 1937, and claimed deduction of the loss for the mill from its total income in 1936 and depreciation of the said mill to be carried forward for the next year in the income-tax return in 1937-38 for the "previous year" (i. e. 1936), which were disallowed. On reference:

Held [per *Beaumont C. J.*, and *Kania J.*]—that the assignee and not the assignor was entitled to such deduction and depreciation.

S. C.

Ramrao Bhagwantrao Inamdar *v.* Babu Appanna Samage.

1939. I. L. R. [1940] Bom. 293 F. B.

Code of Civil Procedure (Act V of 1908) Order 23 rule 1 (2) Cls. (a), (b), section 115—"Other sufficient grounds" in Cl. (b), construction of.

Babu Appanna's suit for injunction against the Inamdars claiming a portion of river-bed as his alluvial land was dismissed but in appeal his application for withdrawal of suit with liberty to bring fresh suit containing declaration for adverse possession was allowed. On revision it was referred to Full Bench :

Held [per *N. J. Wadia, Divatia* and *Lokur JJ.*]—that "other sufficient grounds" in clause (b) are analogous to "formal defects" in clause (a) and that the order being without jurisdiction was subject to revision.

S. C.

Dashrath Supadu Ladsake *v.* Gopal Bhila Gadhari.

1939. I. L. R. [1940] Bom 317.

Indian Limitation Act (IX of 1908) article 182 (5)—"Step-in-aid" of execution.

The first application in 1929 for execution of an instalment decree against Bhila for the dues for 1927 and 1928 was disposed of in 1932 and the next one in 1935 for the total dues i. e. upto 1930 was allowed in part i. e. upto 1928 by the lower courts. On second appeal :

Held [per *Beaumont C. J.*]—that the first application for so much of the decree as was then executable was a step-in-aid of execution for the whole decree and that the last application was in time for the whole amount.

See *Bishundeo Narain Missir v. Raghunath Prasad Missir* (1).

S. C.

(1) (1939) I. L. R. 19 Pat. 354.

Virbhadrayya Nagayya Shivappanmath *v.* Shriman Maharaj Niranjan Jagadguru (Basangowda Mudigowda.)

Transfer of Property Act (IV of 1882) section 105—Suit by lessor for rent—Purchaser (assignee) of lessee's interest, liable. 1939. I. L. R. [1940] Bom. 328.

The lessee's interest was sold in execution in 1931 and certificate was granted in 1934 to the purchaser. Jagadguru's suit in 1936 for arrears of rent for the last 6 years was decreed against the purchaser (assignee) who, on appeal, was held liable from 1931 only. On second appeal:

Held [per *Beaumont C. J.* and *Sen J.*]—that the assignee was liable, by privity of estate, for rent from 1931 only.

S. C.

Deopujan Mahto *v.* Kukur Ahir.

Code of Criminal Procedure (Act V of 1898) section 517—Limitation. 1939. I. L. R. 19 Pat. 337.

Deopujan's buffalo was lost on 12th August, 1937, and Suchit and Kakur being acquitted of charge therefor under section 414 of the Penal Code on 13th March, 1939, applied for the custody of the buffalo but no order was passed thereon on 13th July, 1939. On Kukur's fresh application on 19th September, 1939, without disclosing previous proceedings, the Sessions Judge without notice to other parties directed the buffalo to be made over to Kukur if she be in police or Court custody. In revision it was contended that the fresh application did not lie and the order should have been made on 13th March, 1939:

Held [per *Rowland* and *Chatterjee JJ.*]—that no period of limitation is prescribed for an application for an order under section 517 which should be included in the final order at the conclusion of the case or should be passed at a later date without unreasonable delay after giving due notice to the parties.

S. C.

Nebti Mondol *v.* King Emperor.

1939.
I. L. R. 19
Pat. 369.

Indian Penal Code (Act XLV of 1860) sections 70, 201—Misjoinder—Criminal Procedure Code (Act V of 1898) section 288—Evidence Act. (I of 1872) section 154.

Nebti and others murdered Nebti's brother's widow on 1st March, 1939, secretly and hastily disposed of the body and subsequently gave a false account of her death. They were convicted at one trial for offences under sections 302 and 201 of the Penal Code. On appeal:

Held [per *Rowland* and *Chatterjee JJ.*]—that an accused guilty of murder may also be held guilty under section 201 of the Penal Code, that there is no misjoinder and that the evidence before the committing magistrate can be used under section 288 of the Criminal Procedure Code only if it has evidential value under the Evidence Act.

S. C.

Mussamat Daulat Kuar *v.* Bishundeo Singh

1939.
I. L. R. 19
Pat. 382.

Hindu Law of Inheritance (Amendment) Act (II of 1929) section 2—"Sister", if includes half-sister.

Daulat Kuar's suit as heir of the last male owner being his half-sister was dismissed by the lower Courts. On second appeal:

Held [per *Fazl Ali* and *Chatterjee JJ.*]—that this Act applies to persons subject to the Mitakshara law of succession under Hindu Law and that "sister" does not include half-sister.

S. C.

Lala Rajbali Lal *v.* Partappur Company Limited.

1940.
I. L. R. 19
Pat. 398.

Bihar Tenancy Act (VIII of 1885) section 116—Evidence Act (I of 1872), section 21.

The company, a lessee of the proprietor Hathwa Raj, granted an oral lease for a term of one year or less to Rajbali the lands

whereof were entered in record-of-rights partly as zirat and partly as bakasht thikadar. Rajbali's suit claiming raiyoti interest was dismissed on the ground that the zemindari papers kept regularly in the course of business were admissible and rebutted the entries of bakasht thikadar and that lands were zirat or private lands of the proprietor. On second appeal :

Held [per *Agarwala* and *Rowland JJ.*]—that sections 17 and 21 of the Evidence Act applied, that the zemindari papers were admissible, that section 116 of the Tenancy Act applies and that Rajbali did not acquire occupancy right.

S. C.

Hriday Singh *v.* Kailash Singh.

Negotiable Instruments Act (XXVI of 1881) sections 4, 20. 1940. I. L. R. 19 Pat.. 404.

In a blank paper Kailas signed across the stamp with an endorsement on it that it was a handnote for Rs. 1000 and gave it to Shamnandan as collateral security but he put Hriday's name in it instead. Hriday's suit on the handnote was decreed by munsiff but dismissed on appeal. On second appeal :

Held [per *Agarwalla* and *Rowland JJ.*]—that plaintiff's name could be inserted in the handnote and that Kailas was bound to pay him.

S. C.

Baijnath Ram Marwari *v.* Rai Kumar Sinha.

Bihar Tenancy Act (VIII of 1885), section 177 A. (Cf. section 60(c) of Civil Procedure Code). 1940. I. L. R. 19 Pat. 410.

Baijnath, a money-lender and grain-dealer had a dwelling house and two godowns for storage of grain. He was a raiyat for a holding under Rai Kumar who attached the three buildings in execution of a decree for arrears of rent which was allowed except of the dwelling house. On second appeal :

Held [per *Agarwala* and *Rowland JJ.*]—that the words "and occupied by him" in section 177A clause (b) mean "occupied as such raiyat or under-raiyat", and that this section does not exempt buildings unconnected with his vocation as raiyat or under-raiyat.

S. C.

Brahmdeo Narayan *v.* Brajballabh Prasad.

1940.

I. L. R. 19 Pat. 424.

Contract Act (IX of 1872), section 23—Agreement void—Suit for recovery of balance of consideration or for recovery of land.

Brahmdeo, a tehsildar, induced Brajballabh, his master, to withdraw the case of criminal misappropriation of about Rs. 1550 as rent agreeing to repay the sum and to convey 40 bighas of land in dispute between the parties valued at Rs. 4000; and this was done. Brahmdeo's suit, thereafter, praying for balance of the consideration for the land after deduction of Rs. 1550 or for the recovery of the sum paid by him in cash or for recovery of possession of the land was decreed by trial Court but dismissed in appeal: On second appeal:

Held [per *Agarwala* and *Rowland, JJ.*]—that the consideration was illegal and the agreement void and that the plaintiff could not recover the money paid or the unpaid part of consideration as there was no pressure or unduc influence on him to enter into the agreement.

S. C.

Raja Sri Sri Jyoti Prasad Singh Deo Bahadur *v.* Samuel Henry Seddon.

1939-40.

I. L. R. 19 Pat. 433.

Indian Contract Act (IX of 1872), section 20—Partnership Act (IX of 1932), section 19(2)(c)—Code of Civil Procedure (Act V of 1908), section 80, order 22, rule 5.

The Raja filed a suit for royalty due under mining lease for 32 villages against Seddon & Company, the lessee, and defendants respondents Nos. 7 and 8, the Dagas, and No. 9, Mugneeram Bangur, who jointly acquired leasehold interest of 2 as. share and mortgage interest in the remaining 14 as. share the Raja having

accepted surrender of 15 villages. The lower Court disallowed the Raja's claim regarding the 15 villages and dismissed the suit against defendants 7 to 9. On appeal :

Held [per *Fazl Ali* and *Chatterji, JJ.*]—that the Raja cannot recover royalty of the 15 villages, that the Dagas and Bangur, the assignees of a part of lease, are jointly and severally liable along with other tenants (lessees) for the whole rent (royalty).

S. C.

C. R. Ramaswami Ayyangar (minor) *v.* C. S. Rangachariar.

Court Fees Act (VII of 1870), sections 7(v), 7(iv-A), article 17-B schedule II as amended in Madras (cf. article 17(vi), schedule II as amended in Bengal).

1939.
I. L. R. [1940] Mad. 259 F. B.

A suit was filed by a Hindu minor, in joint possession, against his father, brothers and alienees and creditors of the joint family property praying for (1) accounts, (2) partition, (3) appointment of receiver, (4) for costs and (5) for other necessary reliefs, and paying a court-fee of Rs. 100 under article 17-B schedule II. The Sub-Judge demanded Rs. 6324-9 as. in all as court-fees. In revision it was referred to a bench of three Judges which referred it to a Bench of five Judges.

Held [per *Leach, C. J.*, *Pandrang Row*, *Abdur Rahman*, *Krishnaswami Ayyangar* and *Patanjali Sastri, JJ.*]—that article 17-B schedule B and not section 7(iv) (b) nor 7(v) applies to such a partition suit, that *ad valorem* fees should be paid for relief against alienations and decrees and that no separate fee is payable for appointment of receiver.

Rangiah Chetty v. *Subramania Chetty* (1) overruled and decisions of Calcutta, Allahabad and Lahore High Courts discussed.

S. C.

(1) (1910) 21 M. L. J. 21 (F. B.).

Edward H. M. Bower *v.* Lt. Col. A. M. V. Hesterlow.

Code of Civil Procedure (Act V of 1908), section 92—Trust deed providing scholarships—Private or public trust—Indian Trusts Act (II of 1882), section 34.

1939.
I. L. R. [1940] Mad. 300.

Bower the sole remaining trustee of a trust providing "scholarships" under certain conditions and restrictions for higher educa-

tion to Anglo Indian youths repayable from their income in future, applied for permission to deviate from the trust deed which was refused. On appeal.

Held [per *Leach, C. J.* and *Patanjali Sastri, JJ.*]—that it was not a private but a public trust to which section 92 of Code is applicable.

S. C.

Pandit Shiva Rao *v.* D. A. Shanmugasundaraswami (Liquidator).

1939. I. L. R. [1940] Mad. 306.

Indian Registration Act (XVI of 1908), section 17(1) (e)—Assignment of mortgage decree—Transfer of Property Act (IV of 1882), sections 55 (4), 59, 100.

Rao conveyed certain lands and assigned his mortgage decree by a single deed duly registered (though not as required under section 109 of Companies Act, 1913), which purported to create a charge on the lands for the balance of the consideration, to a Company the liquidator whereof refused to accept him as a secured creditor. Rao's suit against him was dismissed. On appeal:

Held [per *Leach, C. J.* and *Patanjali Sastri, JJ.*]—that a mortgage decree is an immoveable property, that there was no valid charge and that Rao was entitled to unpaid vendor's lien over the property.

S. C.

Mythili Ammal *v.* Janaki Ammal.

1939. I. L. R. [1940] Mad. 329.

Indian Evidence Act (I of 1872), sections 65(a)(e), 74—Certified copy of income-tax return not admissible.

Mythili attached her husband's house in execution which was claimed by her mother-in-law Janaki as her own. The certified copies of income-tax return by Janaki containing statements inconsistent with her present claim produced by Mythili was held inadmissible and Janaki's claim was allowed. On appeal:

Held [per *Burn* and *Stodart, JJ.*]—that the income-tax return is not a "public document" and its certified copy is inadmissible.

S. C.

The Calcutta Law Journal.

Reports.



PRIVY COUNCIL.

PRESENT : *Viscount Maugham, Lord Porter and Sir George Rankin.*

RAJA BHAGWAN BAKSH SINGH

v.

THE SECRETARY OF STATE.

P. C.

1940.

March, 4.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT ALLAHABAD].

Court of wards—Proprietors of estate declared incapable of managing their property—Declaration by Local Government that interest on debts exceeds "gross annual profits" of property—Meaning—Land Revenue to be deducted in computing gross annual profits—Declaration not challengable in Civil Courts—United Provinces Court of Wards Act (No. IV of 1912) Sections 8, 10, 11.

By section 8 of the United Provinces Court of Wards Act, 1912, "(1) Proprietors shall be deemed to be disqualified to manage their own property when they are .... (d) persons declared by the Local Government to be incapable of managing or unfitted to manage their own property ...... (iii) owing to their having entered upon a course of extravagance ; (iv) owing to their failure without sufficient reason to discharge the debts and liabilities due by them : Provided that no such declaration shall be made under sub-clause (iii) or (iv) unless the Local Government is satisfied—(a) that the aggregate annual interest payble at the contractual rate on the debts and liability due by the proprietor exceeds one third of the gross annual profits of the property......"

By section 11 "No declaration made by the Local Government under section 8 or by the Court of Wards under section 10 shall be questioned in any Civil Court."

In arriving at the "gross annual profit" of a property for the purposes of section 8, the amount of land revenue payable must be deducted, but no allowance must be made for any expenses of managing the estate.

Subject to the necessary limitation that good faith is essential to the validity of any declaration, the effect of section 11 is that no resort is left

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to the Court to any person desiring to challenge any declaration made under section 8.

Privy Council Appeal No. 6 of 1939 from a decision of the High Court, Allahabad, dated 31st March 1937, (*Harries* and *Rachhpal Singh, JJ.*) affirming a decree of the Subordinate Judge of Allahabad, dated 14th May 1934.

The appellant, Raja Bhagwan Baksh Singh, was the proprietor of the Amethi estate in the Sultanpur District of Oudh. On 7th March 1930, he was declared by the Governor in Council of the N. W. Provinces under the United Provinces Court of Wards Act, 1912, to be incapable of managing his own property.

The appellant, contending that that declaration was *ultra vires*, brought an action claiming that it was illegal and of no effect against him. The Subordinate Judge dismissed the action and the High Court affirmed his decision. The proprietor of the estate accordingly has appealed. The facts are fully set out in the judgment.

S. D. Casswell K.C., R. K. Handoo and *J. L. Roy* for the the Appellant : We submit in the first place that this action is not barred by S. 11 of the Act. The words "gross annual profits" mean what they say, and their natural and ordinary meaning is the gross annual rents accruing to an owner of property without any deductions whatsoever whether in respect of land revenue or of expenses of managing the estate. If the land revenue chargeable on the estate is not deducted the interest due on all the appellant's debts is less than one third of his gross income. By erroneously, as we submit, deducting the land revenue, the authorities have made the necessary calculation under proviso (a) of S. 8 on a false basis. If they had not deducted land revenue they would have been faced with a figure which by the clear terms of the proviso left them without power to make the declaration now challenged.

The word "gross" has but one meaning in the business world, and it is difficult to reconcile its use in the section with the calculation of the respondent that a large item of annual expenditure is to be deducted in determining the "gross annual profits" of an estate.

In S. 141 of the U. P. Land Revenue Act (III of 1901) land revenue is made payable out of the "rents, profits or produce" of property. Profits, therefore, are there regarded as *ejusdem generis* with rents or produce. The word "profits in the Act of

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1912 ought herefore to be interpreted accordingly as similar to rents or produce; and if the land revenue is stated in the one Act to be payable out of the profits, it would seem to follow that that same word "profits" in the Act of 1912 must mean an income from property out of which land revenue has not yet been paid.

To return, therefore, to the opening submission that the action is not barred, it is submitted that no declaration by the Local Government founded on a mistake of law as to the meaning of "gross profits" can be made in accordance with the condition precedent for such a declaration laid down in S. 8 (1), and if the Local Government are mistaken in their interpretation of "gross profits" they have failed to establish the pre-requisite set up by proviso (a) to S. 8 (1). The foundation for the jurisdiction to make a valid declaration is therefore lacking.

J. M. Tucker, K. C. and *W. Wallach* for the Respondent: It is submitted that the whole scheme of the Court of Wards Act shews that by "gross annual profits" is meant the income of the property after deduction of land revenue. The realities of the matter demand such an interpretation. The Act is concerned with the resources which an estate proprietor has with which to meet his obligations. It would not be likely to take those resources at a price which must necessarily be diminished by the land revenue. Land Revenue comes first, it is only when that has been paid that the remaining resources of the estate can be said to be available for interest on debts.

Even, however, if the Local Government were wrong in law in their interpretation of the Act that would not mean that the essential prerequisite to the exercise of their jurisdiction to make a declaration was lacking. The prerequisite is that the Local Government shall be satisfied that the condition laid down by clauses (a) and (b) of the proviso to section 8(o) are fulfilled, not that they shall be fulfilled in fact. That prerequisite must necessarily have existed for the declaration complained of to have been made. Therefore the action is barred.

C. A. V.

Their Lordships' judgment was delivered by

March, 4.

Lord Porter: The appellant is the proprietor of the Amethi estate in the Saltanpur District of Oudh in the United Provinces of India. On the 7th March, 1930, he was declared by the Governor in Council of the United Provinces who claimed to be acting under the powers conferred upon him by the United

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Provinces Act, No. IV of 1912 (commonly called the United Provinces Court of Wards Act, 1912) to be incapable of managing his own property.

The appellant maintains that the declaration was *ultra vires* and on the 19th March, 1932, instituted a suit in the Court of the Subordinate Judge at Allahabad claiming a declaration that the declaration above mentioned was wholly illegal and of no effect against the plaintiff. His suit was dismissed on the 14th May, 1934, and this dismissal was confirmed by the High Court of Judicature at Allahabad on the 31st March, 1937. From this decision the appellant has appealed to His Majesty in Council.

The Governor's action was taken under sections 8 and 9 of the Court of Wards Act which are as follows :—

"(8).—(1) Proprietors shall be deemed to be disqualified to manage their own property when they are—

(a) minors ;

(b) females declared by the Local Government to be incapable of managing their own property ;

(c) persons adjudged by a competent civil court to be of unsound mind and incapable of managing their own property ;

(d) persons declared by the Local Government to be incapable of managing or unfitted to manage their own property—

(i) owing to any physical or mental defect or infirmity unfitting them for the management of their own property ;

(ii) owing to their having been convicted of a non-bailable offence and being unfitted by vicious habits or bad character for the management of their own property ;

(iii) owing to their having entered upon a course of extravagance ;

(iv) owing to their failure without sufficient reason to discharge the debts and liabilities due by them :

" Provided that no such declaration shall be made under sub-clause (iii) or (iv) unless the Local Government is satisfied—

(a) that the aggregate annual interest payable at the contractual rate on the debts and liability due by the proprietor exceeds one third of the gross annual profits of the property ; and

(b) that such extravagance or such failure to discharge the said debts and liabilities is likely to lead to the dissipation of the property.

" (2) No declaration under clause *(d)* of sub-section (1) shall be made until the proprietor has been furnished with a detailed

statement of the grounds on which it is proposed to disqualify him and has had an opportunity of showing cause why such declaration should not be made.

" 9.—(1) The Local Government may direct the Collector or such other person as it may appoint, to make an inquiry into the circumstances of any proprietor and the extent of his indebtedness........... "

So far as they are relevant to this appeal the facts are as follows : —

On the 13th July, 1929, an enquiry under section 9(1) of the Act of 1912 was instituted by the Local Government into the debts and liabilities of the appellant. After the enquiry the appellant received a letter from the Commissioner of Fyzabad, dated the 17th September, 1929, enclosing a statement of the loans contracted by the appellant, and a statement of the gross annual income, gross annual profits, and land revenue derived from his property. By the letter and statements the appellant was informed that his debts totalled Rs. 14,45,160-7-9 on which the annual interest at the contractual rates amounted to Rs. 1,22,110-9-0 ; that the gross annual income from his estates amounted to Rs. 5,71,626-10-9 ; that the amount payable in respect of land revenue, etc., was Rs. 2,65,117-14-4 ; that the gross annual profits from his estates (arrived at by deducting the amount payable as land revenue, etc., from the gross annual income) amounted to Rs. 3,06,508-12-5 ; and that therefore the annual interest payable at the contractual rates exceeded one third of the gross annual profits. Further the letter charged the appellant with failure, without sufficient cause, to discharge his debts and liabilities and said that such failure was likely to lead to the dissipation of the property. Finally the appellant was informed that, under section 8(1) *(d)* (iii), (iv) provisoes *(a)*, *(b)* of the 1912 Act, he was liable to be declared by the Local Government to be incapable of managing his property, but that, under section 8 (2) of that Act, he could show cause against such a declaration being made.

As a result of this communication the appellant attempted to show cause why no declaration should be made but was unsuccessful and, as stated above, the declaration was made.

From the statement sent to him it is apparent that in calculating whether the annual interest at the contractual rates exceeded one third of the annual profits of his property, the Local Government in order to ascertain the gross annual profits of the estate

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deducted the land revenue from the gross annual income. If this deduction was rightly made it was evident that the annual interest on the appellant's debts exceeded one third of the gross annual profits—if on the other hand the land revenue should not have been deducted, the annual interest on the debts is less than one third of the gross annual profits.

Though some question of the right of the Local Government to deduct certain cesses and annual charitable contributions was also raised, it is conceded that they were not of sufficient amount to have any bearing on the question at issue, and in argument consideration of them was put aside. The sole question considered was whether land revenue was or was not rightly deducted before ascertaining what sum was to be regarded as the gross annual profits.

Altogether apart however from the question whether the construction which he put upon those words was accurate or inaccurate the respondent maintained that the appellant was prohibited from challenging the action taken by reason of the provisions of section 11 of the Court of Wards Act. That section is as follows :—

"No declaration made by the Local Government under section 8 or by the Court of Wards under section 10 shall be questioned in any civil Co urt."

A number of other questions had been raised and argued before the Courts in India but before their Lordships the respondents rested their case solely upon the two points mentioned.

(1) It may be, as stated by Jessel M. R. and repeated by Lord Bramwell in *Last* v. *London Assurance Corporation* (1), that of itself the phrase "gross annual profits" has no definite meaning. It must take its colour from its surroundings. In the present case therefore it is necessary to consider those surroundings by an examination of the scheme of the Court of Wards Act, the way in which land tax is regarded in India and any provisions of the Land Revenue Act which bear upon the matter, in addition to the exact wording of section 8 itself.

The object of disqualification under section 8 is no doubt threefold—it will protect persons incapable of managing their own affairs—it will prevent the splitting up or as the Act itself says " the dissipation of the property " and in either event it will enable land revenue to be more easily and more certainly collected.

(1) (1885) 10 App. Cas. 438 (456).

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That the collection of land revenue is an important consideration is apparent both from the objects aimed at and from the fact that by section 4 of the Act the Board of Revenue is made the Court of Wards for the United Provinces. Indeed in earlier schemes in respect of the disqualification of proprietors, the necessary provisions were contained in the Land Revenue Acts themselves, and even in the present Act the definition of proprietor is only reached by reference to "Mahal" and its meaning in the Land Revenue Act from time to time in force.

Moreover though minors, certain females and lunatics—to take three of the classes mentioned in section 8 of the Act—may require protection whether their property be in land or personalty, it is to be observed that under that section only proprietors, i. e., those beneficially interested in a mahal, are dealt with, and mahal primarily means a local area held under a separate engagement for the payment of land revenue.

No doubt when once a proprietor is made a ward, all his property is, under section 16 (1) of the Act, put under the superintendence of the Court of Wards, but the original assumption of wardship is only possible in the case of proprietors or land owners paying Land Revenue.

In considering the way in which land revenue is regarded in India no comparison with tenures in England is of much (if any) assistance. Its universality, its quantum, and the tendency of the Indian outlook to regard the Government as a sharer in all the produce of the land are matters of importance.

By section 58 of the Land Revenue (United Provinces) Act of 1901 it is provided

"58.—(1) All land, to whatever purpose applied and wherever situated is liable to the payment of revenue to the Government, except such land as has been wholly exempted by special grant of, or contract with, the Government or by the provisions of any law for the time being in force.

"(2) Revenue may be assessed on land, notwithstanding that that revenue, by reason of its having been assigned, released, compounded for or redeemed, is not payable to the Government.

"(3) No length of occupancy of any land, nor any grant of land made by the proprietor, shall release such land from the liability to pay revenue."

But not only is the incidence of the revenue universal, it is also generally fixed at a sum varying from 40 to 45 per cent. of

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the total income. If in addition to this percentage the proprietor has encumbered his estate to the extent of one third of the income, between 70 and 80 per cent. of the total receipts would be removed from his control and from 20 to 30 per cent. only remain—a small margin from which to ensure the payment of revenue and the protection of the mahal against foreclosure or sale under any mortgages created by the proprietor.

In their Lordships' view these considerations inevitably lead to the conclusion that Land Revenue must be deducted in calculating the gross annual profit of a property.

Even apart however from these considerations the wording of section 8 of the Court of Wards Act itself would lead their Lordships to the same conclusion.

Under proviso (*a*) to sub-section (iv) of section 8 the contrast is between the aggregate annual interest payable by the proprietor and the gross annual profits—a phraseology which would naturally point to a contrast between what the proprietor received and the interest which he owed, and would so point none the less though it is the profits of the property and not of the proprietor which have to be considered. Indeed to substitute the former consideration would bring into account a matter which is obviously extraneous to the considerations with which the Legislature was concerned, viz., the profit derived by the proprietor from his personal estate. Moreover the words are "annual profits"—not "annual rent" or "income," and seem to refer to some profits half way between the total income of the estate and the net profits remaining after the management expenses have been paid.

If the total produce or income of the estate had been intended it would have been easy enough to say so—indeed in section 141 of the Land Revenue Act of 1901 land revenue is said to be a first charge on the rents, profits or produce of every mahal, as opposed to the phrase "gross annual profits" in section 8 of the Court of Wards Act.

Moreover if land revenue is not to be deducted before the gross annual profits are arrived at in calculating the ratio of charges to profit land revenue would appear on neither side of the account, neither as a charge nor as a deduction from profits.

Therefore even accepting the view presented by the appellant that "gross profits" has of itself no definite meaning, their Lordships, bearing in mind the circumstances above mentioned, are of opinion that in the Court of Wards Act land revenue must

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be deducted but no allowance for any expenses of estate management must be made in arriving at the gross annual profit of the property.

This conclusion alone would involve the dismissal of the appeal, but the preliminary question whether any action in the Courts was possible having regard to the provisions of section 11 of the Act was fully argued and is a matter of importance on which their Lordships think their decision should also be given.

Sections 10, 11, 12 and 13 deal with the limitations of the jurisdiction of the Civil Court and are as follows :—

"10. A proprietor may apply to the Collector to have his property placed under the superintendence of the Court of Wards and the Court of Wards may, on being satisfied that it is expedient to undertake the managment of such property, make a declaration to this effect.

"11. No declaration made by the Local Government under section 8 or by the Court of Wards under section 10 shall be questioned in any civil court.

"12.—(1) The Court of Wards shall assume the superintendence of the property of any proprietor disqualified under clause (*b*) or (*d*) of sub-section (1) of section 8 or in regard to whose property a declaration has been made under section 10.

"(2) The Court of Wards may in its discretion assume or refrain from assuming the superintendence of—

(*a*) the property or person and property of any proprietor disqualified under clause (*a*) or (*c*) of sub-section 1 of section 8 ;

(*b*) the person of any proprietor disqualified under clause (*b*) or (*d*) of sub-section 1 of section 8.

"(3) The Court of Wards may assume the superintendence of the person of any minor who has an immediate or reversionary interest in the property—

(*a*) of any proprietor disqualified under section 8 ; or

(*b*) of any proprietor in regard to whose property a declaration has been made under section 10.

"13. If the right of the Court of Wards to assume or retain the superintendence of the person or property of any disqualified proprietor is disputed by such proprietor or, if he be a minor or of unsound mind, by some person on his behalf, the case shall be reported to the Local Government, whose orders thereon shall be final and shall not be questioned in any civil court."

It will be observed that section 11 is only concerned with

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action taken under sub-sections (1) (*b*) or (*d*) of section 8, and under section 10, i.e., those cases in which a declaration is made, leaving the other cases in which superintendence of the property is assumed (or possibly all cases after it has been assumed or in which it is retained) to be dealt with by section 13.

In terms section 11 appears to prohibit the bringing of an action disputing the validity of a declaration made by the Court of Wards under those sub-clauses of section 8. Some limitation must no doubt be put upon the generality of the provision in as much as good faith at any rate is required. The appellant, however, goes further and says that the Court of Wards is without jurisdiction and can be declared to be without jurisdiction by the Civil Court in all cases in which the preliminary requirements of section 8 have not been fulfilled. So far as sub-sections (1) (*b*) and (*d*) are concerned the primary requirement contained in those sub-clauses themselves is merely that the Governor in Council should declare the proprietors incapable or unfitted to manage their own property.

Under (*b*) it seems impossible to put any limitation on that jurisdiction. Under (*d*) (i) (ii) (iii) and (iv) the matter again seems to be one for the discretionary judgment of the Local Government. It is conceivable that under (*d*) (ii) the jurisdiction only exists provided the proprietor has been in fact convicted of a non-bailable offence and that if this fact were non-existent the Local Government would be acting *ultra vires* in making a declaration, but it is difficult to imagine that in sub-sections (i) (iii) and (iv) and indeed in that part of sub-section (ii) which concerns unfitness by reason of vicious habits or bad character, the Local Government should have an absolute discretion whereas in the final part of sub-section (ii) its jurisdiction should be limited.

In argument before their Lordships however the allegation that the action of the Local Government was *ultra vires* was founded not upon the wording of the sub-clauses but upon the proviso to sub-clauses (iii) and (iv) and it was said that if the Governor in Council showed by his decision that he interpreted the phrase "gross annual profits" wrongly in law then he could be declared to have assumed an unjustified jurisdiction.

But in such an argument the same difficulty arises as is to be found on a consideration of the sub-clauses themselves. No logical distinction between fact and law was propounded to their Lordships and indeed it is difficult to see why a wrong calculation under

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proviso *(a)* should be unchallengeable, whereas a wrong view as to the meaning of "gross annual profits" should be open to question. Nor indeed is it easy to draw a distinction between fact or law on the one part and opinion on the other since proviso *(b)* by which the Local Government are equally governed is a matter of opinion alone.

Apart from a close analysis of section 8 itself there are other reasons for thinking the decision of the Local Government to be unfettered. Under section 8(2) careful provision is made for a hearing of the proprietor's case before a decision is made, and in the case of sub-clauses *(a)* and *(c)* section 13 expressly provides for the method which shall be followed if the right of the Court of Wards is challenged and the decision so attained is declared to be final.

Moreover the proviso itself expressly requires the satisfaction of the Local Government, not that of a Court and it is, in their Lordships' view, unlikely that a decision solemnly, come to by the Governor in Council after full enquiry and when declared by the Act to be final, should thereafter be subject to review by the local Courts of the Province.

In coming to this conclusion their Lordships are in no way overlooking the importance of jealously scrutinizing the jurisdiction conferred on executive bodies or of giving no wider interpretation than is necessary to any limitation of the powers of the Court. But however carefully the liberty of the subject has to be guarded not only is there sound sense in making the decision of the Local Government final but it has also to be remembered that a right construction of the Act can only be attained if its whole scope and object together with an analysis of its wording and the circumstances in which it is enacted are taken into consideration.

From an examination of the Act alone their Lordships would have reached the conclusion that owing to the provisions of sections 11 and 13 of the Act no resort to the Courts was left in this case under section 8, and the other circumstances to which their Lordships have referred so far from weakening have strengthened that conclusion.

Having reached a decision opposed to both the contentions put forward on behalf of the appellant they will humbly advise His Majesty that the appeal should be dismissed with costs.

Douglas Grant & Dold: Solicitors for the Appellant.

Solicitor, India Office: Solicitors for the Respondent.

R. C. C. *Appeal dismissed.*

APPELLATE CIVIL.

Before Mr. Justice A. S. M. Akram.

CIVIL.

1940.

April, 26, 29, 30.

BHOLA NATH DUTTA

v.

SM. NARAYAN KUMARI DASSI AND OTHERS.*

Record of rights, presumption—Such record of rights, if supersedes the decision of the Civil Court.

A record of rights merely raises a presumption and it cannot supersede the decision of the civil court especially when it is given after contest and on a specific issue framed in respect of any question.

Appeal by the Plaintiff.

Suit for recovery of rent.

The material facts appear from the judgment.

Messrs. Gopendra Nath Das, and *Lala Hemanta Kumar* for the Appellant.

Mr. Nripendra Nath Datta Roy for the Respondents.

The judgment of the Court was as follows :

April, 30.

These five analogous appeals by the plaintiff, namely, Second Appeals Nos. 416 to 420 of 1938, arise out of five suits instituted for the recovery of 8 annas share of rents, cesses and damages on the allegation that there existed five separate tenancies bearing respectively the Jamas of Rs. 22-8, Rs. 49-12 as. odd gandas, Rs. 19-11 annas odd gandas, Rs. 5-6-17½ gandas and Rs. 17-4 annas odd gandas.

The Second Appeals Nos. 417, 418 and 420 of 1938 together with the suits out of which they arose were withdrawn at the time of the hearing, so that it is now the remaining appeals only, that is, Second Appeals Nos. 416 and 419 of 1938 arising respectively out of Suits Nos. 3033 and 3062 of 1936 with which I am concerned.

In the Court of trial the defence taken regarding these suits was that the original Jamas of Rs. 22-8 and Rs. 5-6-7½ gandas claimed by the plaintiff had long ceased to exist, as these Jamas were con-

* Appeals from Appellate Decrees Nos. 416 and 419 of 1938, against the decrees of B. K. Besu, Esq., District Judge, Burdwan, dated the 30th September, 1937, affirming those of Dhirendra Nath Bagchi, Esq, Munsiff, 1st Court, Katwa, dated the 30th April, 1937.

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solidated with the Jamas of certain other lands in the year 1920, and a bigger Jama of Rs. 98-0-6 annas was formed.

The plaintiff in support of his claim filed two previous judgments in rent suits Nos. 1944 and 3072 of the year 1932 relating respectively to the subject-matter of the present suits Nos. 3033 and 3062 of 1936. From the said judgments and decrees it is apparent that the defendants had failed to substantiate the objection raised in the suits of 1932, which was identical with the objection which has been taken in the present suits, namely, that there was an amalgamation with various other Jamas in the year 1920, and a bigger Jama of Rs. 98-c-6 pies was constituted in respect of the Jamas of the aforesaid suits. The contesting defendants on the other hand in support of the assertion of amalgamation of rents and lands, as stated above, filed the Record-of-Rights finally published in March, 1934.

In the present suits there were only two points for determination set out in the judgment of the trial Court, namely (1) Is there any relationship of landlord and tenant between the parties to each of these suits in respect of the Jama claimed therein, and is the plaintiff entitled to recover the rent at the rate as claimed by him in each of them ? (2) What relief, if any, is the plaintiff entitled to ?

Both the Courts below dismissed the suits, holding that the Record-of-Rights prevailed over the rent decrees of 1932. From that decision the plaintiff preferred the present appeals.

It has now been urged on behalf of the appellant that the decision of 1932 operated as *res judicata* and that the Courts below were in error in brushing it aside in the absence of any assertion of fresh arrangement between the parties subsequent to the decision of 1932. Reference was made in this connection to the cases of *Shib Chandra Talukdar* v. *Lakhi Priya Guha* (1); *Jaladhar Bhowmick* v. *Birendra Nath Rai Choudhuri* (2).

In my opinion the contention of the appellant is well founded and should be given effect to. After all, the Record-of-Rights merely raises a presumption and it cannot supersede the decision of the Civil Court, especially when it is given after contest and on a specific issue framed in respect of any question. The defence of taking a settlement in 1920 was negatived in the suit of the year, 1932. The defendants in the circumstances should not be allowed to raise the same defence over again in the present suits.

(1) (1924) 40 C. L. J. 507.
(2) (1920) 35 C. L. J. 200.

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The decision in the case of *Gnanada Gobinda Choudhuri* v. *Nalini Bala Debi* (1), cited by the respondent does not appear to me to lay down anything contrary to the above view.

I accordingly allow these appeals and decree the suits Nos. 3033 and 3062 of 1936 in respect of the plaintiff's 8 annas share with regard to the Jamas of Rs. 20-13-16 gandas and Rs. 5-6-17½ gandas as ascertained in the previous suits of 1932.

I assess the hearing-fee at one gold mohur in each case.

P. R. *Appeals allowed.*

(1) (1925) 43 C. L. J. 146.

Before Mr. Justice R. C. Mitter and Mr. Justice T. J. Y. Roxburgh.

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January, 9, 10, 11, 12, 15, 16, 17, 18, 23, 24, 25, 29, 30, 31. February, 1, 2, 5, 6, 7, 8, 9, 12, 15. March, 6.

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v.

RAJA BIJOY SINGH DUDHORIA, ON HIS DEATH HIS HEIRS AND REPRESENTATIVES RAJ KUMAR CHANDRA SINGH (MINOR) AND OTHERS.*

Possession, suit for—'Pargana' and Taraf, meanings of—Inference—Long possession—Title resting on reformation in situ—*Absence of an offer by putnidar to pay additional rent for increment in his tenure—Alluvion and Diluvion Regulation (XI of 1825), Sec. 4—Claim for mesne profits—Tentative value not given—Effect of—Application to appellate Court for amendment of plaint—Amendment, if can be granted—Civil Procedure Code (Act V of 1908), O. 7 R. 11 (e).*

A Pargana, which usually covers a very large tract and means a large local division of the Mahomedan times, which corresponds in idea, though not in extent, with a district of modern times, does not convey the idea of a compact area of land with no public and navigable river cutting through it. As the word Taraf means a sub-division of a Pargana including several villages, the idea of compactness is not necessarily conveyed by this word.

*Appeal from Original Decree No. 95 of 1934, against the decree of Babu Kshitipati Nath Mitra, Additional Subordinate Judge of Nadia, at Krishnagar, dated the 23rd October, 1933.

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Long possession raises the inference of its title to possession but affords no basis for the further inference that that title rested on reformation *in situ* and not on accretion.

Forbes v. *Meer Mahomed Hossein* (1); *Secretary of State* v. *Durbijoy Singh* (2); *Haidar Khan* v. *Secretary of State* (3) and *Secretary of State* v. *Maharaja Radha Kishore Manikya* (4) distinguished.

The absence of an offer by the patnidar to pay additional rent for the increment in his tenure cannot take away the right conferred on him by section 4 of Regulation XI of 1825, that is becoming an increment to patni tenure.

In the plaint the plaintiff appellant claimed mesne profits from 12th September, 1927, till redelivery of possession. No Court fee was paid on the claim for mesne profits but a statement was made that court-fee on that relief would be paid when ordered by the Court :

Held, that the plaint ought to have given a tentative valuation for the claim for mesne profits and on that valuation court fees ought to have been paid.

The appellate Court on application for amendment allowed the plaintiff to value the relief and pay the court fee. Such an amendment could be granted at any stage of the suit.

A party can in the appellate Court withdraw any application made by him on which no order was passed by the primary Court.

Appeal by the Plaintiffs.

Suit for recovery of possession and for mesne profits.

The material fact appear from the judgment.

Messrs. U. N. Sen Gupta, Manmatha Nath Das Gupta and *Birenda Nath Sen Gupta (for Mr. A. C. Mukerji)* for the Appellants.

Messrs. Pramatha Nath Mitter, and *Samarendra Krishna Deb* for the Respondents.

Mr. Amiruddin Ahmed for the Deputy Registrar.

C. A. V.

The following judgment was delivered :

Touzi No. 523 of the Murshidabad Collectorate, which comprised pergunah Goas, was permanently settled in 1793 on the basis of the Decennial Settlement of 1789. It consisted of twelve *hudas*, each *hudda* being subdivided into several Tarafs or collection of villages. We are in this appeal concerned with village Udaynagore in Taraf Udaynagore which is in *hudda* Ikuri.

(1) (1873) 20 W. R. 44 P. C.; 12 B. L. R. 210.
(2) (1891-92) I. L. R. 19 Calc. 312; L. R. 19 I. A. 69.
(3) (1908) I. L. R. 36 Calc. 1 P. C.; 8 C. L. J. 436.
(4) (1916) 25 C. L. J. 425; 21 C. W. N. 291.

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In 1799 Raja Debi Singh purchased the said Touzi or Zemindary at a sale for recovery of arrears of revenue. The Zemindary ultimately devolved by succession on his descendants Raja Gopal Singh, Krishna Chandra Singh and Ram Chandra Singh. At a partition in or about the year 1830, Ram Chandra Singh got in his eight annas odd share six out of the twelve *huddas*, including *hudda* Ikuri. On the 8th April, 1836 he granted *patni taluqs* of two *mehals*, to one Radhabullav Mukhopadhya [Exhibit 6 b(1) B. 148*]. The first *mehal*, which comprised Taraf Udaynagore with some exceptions, was let out on annual *patni* rent of Rs. 1852-0-11 (Sicca = Rs. 1975-8-1 in Company's coin) and the second *mehal* called Hat Jelangi at an annual *patni* rent of Rs. 1201 (Sicca = Rs. 1281-1-0 in Company's coin). Radhaballav Mukhopadhya sold his *patni* interest on the 22nd November, 1839 to John & Robert Watson (Messrs. Robert Watson & Company) (Exhibit 7, B 144). Robert Watson & Company in turn sold the same along with other properties to Messrs. Robert Watson & Company Limited on the 26th May, 1890 [Exhibit 27, B. 272]. The latter conveyed the same to one Crawford on the 29th November, 1902 [Exhibit 27(a), B. 379] who in turn sold the same to the Midnapore Zemindary Company Limited, the plaintiff in the suit, on the 3rd December, 1906 [Exhibit 27(b), B. 408].

The Zemindary interest in the aforesaid six *huddas* of Touzi No. 523 devolved in the following manner. From Ram Chandra Singh it passed to Robert Watson, James Dalrymple and John Watson Laidley and then to James Darlrymple and John Watson Laidley [Exhibit 26 C. 838]. The successors-in-interest of James Dalrymple and John Watson Laidley sold the same to Rai Bishun Chand and Rai Budh Singh Dudhoria, the predecessors of the contesting defendants, on the 22nd June, 1893 [Exhibit 27(c); B. 285]. For the purpose of deciding some of the controversies we will have to consider in some detail some of the aforesaid conveyances.

In 1850-54 there was Revenue Survey of villages Udaynagore and the other adjoining villages. The Revenue Survey map is Exhibit 28(19) [Map No. 22 M(1)]. The position of the flowing

* We have marked the paper-books thus :—

Part I as A.	Part II Vol. III as D.	Case Map (O'Donel's map) as M.
Par II Vol. I as B.	Part II Vol. IV as E.	Part II Vol. I of maps as M(1).
Part II Vol. II as C.	Part II Vol. V as F.	Part II Vol. II of maps as M(2).

river Padma is shown in that map. In 1867-68 the revenue authorities again surveyed the locality and prepared a map-Exhibit 28(12) [Map No. 15 M(1)]. This map and other maps prepared at this survey will hereafter be called the Diara maps of 1867-68 and the proceedings for assessment of revenue based on the said survey of 1867-68 as the Diara proceedings of 1869.

The Diara maps of 1867-68 indicated that a good portion of what had been shown in the Revenue Survey Map of 1850-54 to be dry lands and appertaining to Touzi No. 523 had gone under the river bed, and a large block of land had emerged out of bed of the river as it flowed in 1850-54, the river having since then moved further east at the place. Proceedings were accordingly taken by the Government to assess to revenue what appeared to be "added lands" on a comparison of Diara Survey Map of 1867-68 with Revenue Survey Map of 1850-54. Objections were filed by Messrs. Robert Watson & Company as *patnidars* and by Sreenarayan and Harimohan Bagchis, *patnidars* of two other Mouzas Poreshpore and Ramnarayanpore also appertaining to Touzi No. 523. It is unnecessary to detail the nature of those objections which mainly related to the correctness of the boundaries between the different Mouzas of the said estate as laid down by the Diara Survey Amin. Those objections were considered by the Survey Deputy Collector, Mr. Bhagaban Chandra Sen, who recorded his findings in his Robakari of the 26th August, 1869 [Exhibit F, B. 191]. He gave effect to some of the objections, and directed sketch maps to be prepared of the lands which had been found by him to be an increase of area to the Mouzas of Touzi No. 523 by the action of the river. He further directed, if the Superintendent of Survey agreed with his views, those maps to be sent to the survey office for calculating the areas. This was done and in the Thakbust statement, which has embodied the modifications made in the said Robokari, the details about the increase and decrease in area of the several Mouzas on account of fluvial action since the Revenue Survey of 1850-54 are noted [Exhibit P. 4, B 158—163; Exhibit P. 5, B 164-183]. The diluvion was to the extent of 21087 bighas 8 cottahs 14 chitaks in villages Atarpara, Chowmadia, Tamadia, Udaynagore Diar (villages appertaining to Taraf Udaynagore) and other villages [Exhibit L(1), F. 2009-2011] and what was treated as accretion came up to 28388 bighas 7 cottahs 10 chittacks. Out of this an area of 22111 bighas 19 cottahs was treated as accretion to Mouza Udaynagore as shown in the Revenue Survey Map of 1850-54 [Ex. 28(19); Map No. 22 M(1)] and marked therein as "Udaynagore 378". We will

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hereafter call this Udaynagore either as Revenue Survey Udaynagore or *Asli* Udaynagore and the aforesaid area of 22111 bighas 19 cottahs which was treated by the Diara officers as accretion either as char Udaynagore or Udaynagore Chak No. 1, the latter being the designation given to it in the Diara Survey Map, Exhibit 28(12) [Map No. 15 M(1)]. The said area of 28388 bighas 7 cottahs 10 chittaks was assessed to a revenue of Rs. 3177-10 [Exhibit L(2); F 2014-2018] from the year 1870. It was formed into a Touzi No. 512 of the Murshidabad Collectorate, and settled permanently with James Dalrymple and John Watson Laidley under the provisions of Act IX of 1847 [Exhibit M(1)—Kabuliat, dated 16th August, 1870; B. 197-200]. We may, however, point out, though the matter is not of great importance, that the whole of the area, which was treated by the Diara Officers as accretion to *Asli* Udaynagore on the basis of the Revenue Survey Map of 1850-54 was not so, for a good slice of land on the eastern portion of Udaynagore Chak No. 1 represented the re-formation *in situ* of the western portion of villages Atarpara, Chowmadia and Tamadia as depicted in the Revenue Survey Map of 1850-54. This is made clear by Mr. R. C. Sen's map [Exhibit 28 (25), Map No. 28 M(1)], where the position of the Revenue Survey river of 1850-54, of the Diara Survey river of 1867-68 and the limits of Udaynagore Chak No. 1, which was included in Touzi No. 512, are shown. James Dalrymple and John Watson Laidley obtained on their application an abatement of revenue to the extent of Rs. 4030-2-3 on account of diluvion of the aforesaid area of land of 21087 odd bighas [Exhibits L(1); F 2009 and Exhibit L(3) F 2010].

In 1915-16 the Survey and Settlement proceedings under Chapter X of the Bengal Tenancy Act were commenced and the Record-of-Rights were finally published, some in 1920 and some in 1921. The lands which were found as accreted lands in the Diara proceedings of 1869 and which were then above water were recorded under Touzi No. 512 and the plaintiff appellant was recorded as being in possession as *patnidar* under the principal defendants respondents, the Dhudhurias. Just after the final publication of the Record-of-Rights, proabably in the season 1921-1922, the lands in suit together with other lands emerged out of the river. Some time after their formation proceedings under section 145 of the Criminal Procedure Code were started on the 6th May, 1926 with Raja Bijoy Singh Dhudhuria (one of the defendants' predecessor-in-interest) as first party and the Midnapore Zemindary Company Limited as the second party. The subject-matter of those proceed-

ings was a block of 5000 bighas of land marked with the letters *Ka, Kha, Ga, Gha, Uma, Cha* and *Chha* in a map prepared by Mr. O'Donel in the season 1924-1925. [Exhibit 13, C 604]. This map is a part of the plaint and has been printed in the volume which we have marked as M. Those proceedings terminated in favour of the 1st party, the Raja, on the 12th September, 1927 [Ex. 12; C 617]. On the 8th September, 1928, the Midnapore Zemindary Company Limited filed the suit against Raja Bejoy Singh Dhudhuria and his co-sharers and their tenants for recovery of possession of the said block of 5000 bighas of land on declaration of its *patni* right and for mesne profits. The said block of land occupies a portion of the bed of the flowing river Padma as at the time of the Revenue Survey of the year 1850-54. The Subordinate Judge by his judgment and decree, dated the 23rd October, 1933 has dismissed the suit. The Midnapore Zemindary Company Limited has accordingly filed this appeal.

As in our judgment the learned Subordinate Judge has gone beyond the pleadings and has dismissed the plaintiff's case on a defence not taken in the written statement and as the learned Advocate for the appellant made persistent attempts to go beyond the case made in the plaint it is necessary here to summarise the cases of the parties as made in the pleadings :

Three cases are made in the plaint. The first is that the lands in suit are re-formations *in situ* of village Udaynagore as it had been permanently settled in 1793 along with the other villages of the 12 *huddas* of Pergunnah Goas. This case which is definitely made in paragraph 21 of the plaint is rested on the broad foundation laid in the preceding paragraphs of the plaint. Therein it is stated that Touzi No. 523, the permanently settled estate, comprised 12 *huddas* which comprised several compact blocks of land called Tarafs, each Taraf being made up of several co-terminous villages (Para. 2). Taraf Udaynagore in *hudda* Ikuri was a Taraf which included co-terminous villages Udaynagore, Tamadia, Chowmadia etc. (Para. 6) from before the Permanent Settlement (Para. 8). At the time of the Decennial Settlement and Permanent Settlement the flowing river Padma was not within Touzi No. 523 at all (Para. 4), but some time before the Revenue Survey of 1850-54, the river came inside the Touzi, passed through the villages of Taraf Udaynagore, and separated them on both its banks (Para. 8). Soon thereafter the river Padma receded and large tracts of land re-formed *in situ* of the village Udaynagore etc. Those lands were assessed to revenue by the Diara authorities in 1867-68 on an erro-

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neous view of law and formed into a separate estate. Touzi No. 512 thus illegally and erroneously created was settled with the then proprietors of Touzi No. 523. In fact the whole of Touzi No. 512 represented the re-formations *in situ* of the lands of Touzi No. 523.

The second case made in the plaint is the case of estoppel—that the principal defendants cannot say that the lands of Touzi No. 512 are not the re-formed lands of Touzi No. 523 or question the *patni* right of the plaintiff over the so-called lands of Touzi No. 512. This plea is taken in paragraphs 13 and 14 of the plaint, though not in the precise form in which estoppel ought to be pleaded.

The third case is an alternative case pleaded in paragraph 24. The plaintiff company claims the right to recover Khas possession on the ground that the lands of Touzi No. 512 were accretions to the lands of Touzi No. 523, meaning thereby that portion of Touzi No. 523 in which it had *patni* rights. As we read the plaint it is not the plaintiff's case that the flowing river Padma was within the ambit of Touzi No. 523 and that its bed had been assessed to revenue and so included in the said Touzi at the time of the Decennial and Permanent Settlements. The reference to assessment of revenue made in the last part of paragraph 4 cannot, in view of what has been stated before and after, in our judgment, be construed to mean assessment to revenue, and inclusion of, the bed of flowing river Padma, which was a big public navigable river, within the Zemindary, Touzi No. 523. The property in the river bed of such a river is in the Crown, and it would require more specific pleading to raise such a case. The word *damosh* means a *beel* or inland pool of shallow water being a part of the deserted bed of a river, the words *koha* Padma mean the bank of the river and the words etc., which follow the phrase cannot in view of the preceding sentence of the said paragraph include the bed of a large flowing navigable river.

In their written statement the contesting defendants deny all the material allegations in the plaint on which the case of re-formation *in situ* of the lands of Touzi No. 523 had been rested. They deny the fact that Taraf Udaynagore at the time of the Decennial and Permanent Settlements consisted of co-terminous villages and that the flowing river Padma was outside Touzi No. 523. They further state that the lands in suit were outside the said estate, being then in the bed of the flowing river Padma. They further aver that they are not estopped from asserting that Touzi No. 512 represented accreted lands or from questioning the plaintiff's

patni right in the lands in suit. They however admit that the lands of Touzi No. 512 were accretions to Touzi No. 523 but attempted to meet the plaintiff's alternative case based on the right of accretion by the defence set out in paragraph 10, a defence which we will have to consider in detail when dealing with the merits. In paragraph 21 they state that the plaintiff did not purchase the *patni* right, if any, in the lands of Touzi No. 512, which were entirely distinct and separate from the lands of Touzi No. 523. By an application for amendment of the written statement made on the 12th May, 1930, and granted on the 31st May, 1930, (Order No. 34, A—8) paragraph 10 of the original written statement as also some other paragraphs were amended. An additional defence was also taken, namely of adverse possession.

In this state of the pleadings we can at once state that the learned Subordinate Judge was not right in dismissing from consideration the plaintiff's case of accretion on the footing that the lands which were formed into Touzi No. 512 in 1869 had risen in the river bed as an island Chur with unfordable channels all round. Similarly during the course of the hearing before us we stopped the learned Advocate of the appellant from urging in an alternative form that the flowing river Padma was inside Touzi No. 523 at the time of the Decennial and Permanent Settlements, and that its bed had been assessed to revenue and so made a part of Touzi No. 523, on the ground that not only such a case has not been made in the plaint but that it is a case inconsistent with and contradictory to the case made therein.

We would now proceed to consider the arguments advanced before us and record our findings thereon.

To establish his case that the lands in suit are re-formation *in situ* of Asli Udaynagore Mr. Sen Gupta, the learned Advocate for the appellant, has addressed us on three main lines. He says, first, that the villages of Taraf Udaynagore formed a compact block of land at the time of the Decennial and Permanent Settlements. The Revenue Survey river of 1850-54 as shown in the Revenue Survey map, Ex. 28 (19) [Map 22 M (1)], which shows some villages of the said Taraf, namely Udaynagore Diar, Ramnarayanpur and Udaynagore on the western bank of the river and the remaining villages namely, Atarpara, Chowmadia and Tamadia on the eastern bank, was not there at the Decennial or Parmanent Settlement. To support this contention he relies upon

(a) the meaning of the word Taraf,

(b) the area of Taraf Udaynagore as given in the Rakbabandi

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(Ex. 1, B. 8) and the area thereof at the time of the Revenue Survey of the year 1850-54,

(c) some entries in the Dastur Rewaz [Ex. 2 to 2 (9); B 52 to 110],

(d) the terms of the *patni potta* of the 8th April, 1836 [Ex. 6(b) 1; B. 148].

(e) some of the entries in the Mahalwari Register (Ex. 25; C. 750—836), and

(f) the judgment of Morris & Prinsep, JJ in 1880 [Ex. 12(4) B. 260].

The second line of argument is directed to show that either the river Padma was entirely outside Pergunah Goas, that is outside Touzi No. 523, at the time of the Decennial and Permanent Settlements, or, if that was not so, the block of land in dispute was firm land then, being a portion of the island of Nipara as shown in Rennel's and Colebrook's maps. To support this contention he relies upon :

(a) Rennel's map of 1870 [Ex. z, map 50 M (2)],

(b) Colebrook's map of 1796-97 [Ex. 28 (1), map No. 4 M (1)],

(c) a passage at page 297, Vol. II, of the Fifth Report on the affairs of the East India Company (Reprint in 1917 by R. Cambray & Co. = page 337 of the original edition); a passage at page 21, Vol. 8, of Hunter's Statistical Accounts of Bengal; on the judgment of Morris and Prinsep JJ of the year 1880 [Ex. 12 (4), B. 260] and on the map [Map 2 M (1)] which was made a part of that judgment,

(d) the plaints in the two suits brought respectively by the *patnidars* of Sagarpara and the *mukurari mourasidars* of Chak Mathuranath against Robert Watson & Co. [Ex. 16; B 244; Ex. A (a), B. 248] and the judgment passed in last mentioned suit (Ex. Y, B. 250),

(e) admissions made by the contesting defendants and their predecessors-in-interest, and

(f) the Record of Rights prepared and published under chapter X of the Bengal Tenancy Act in 1920 & 1921.

In dealing with this part of the case Mr. Sen Gupta attempted to explain away the Robakary of Mr. Bhagban Chandra Sen of 1869 and the act of James Dalrymple and John Watson Laidley in accepting the settlement of Touzi No. 512 from the Government on the footing that it was an accreted estate.

The last line of argument is based on the fact of long posses-

sion as *Patnidars* by Robert Watson & Co. and their successors-in-interest of the lands which were designated by Touzi No. 512.

I. Mr. Sen Gupta contends that the word 'Taraf' signifies a collection of co-terminous villages, villages forming a compact block of land. There is nothing to support him. The word means a subdivision of a Pergunah including several villages. This is the meaning given in Wilson's Glossary, page 511 and is the meaning adopted by the Judicial Committee in *Rani Hemanta Kumari Debi* v. *Secretary of State for India in Council* (1). A Pergunah, which usually covers a very large tract and means a large local division of the Mahomedan times, which corresponds in idea, though not in extent, with a District of modern times, does not convey the idea of a compact area of land with no public and navigable river cutting through it. Moreover in the Province of Bengal in many cases such a river cuts through a Pergunah. The idea of compactness is not conveyed by the word Pergunah and so necessarily not by the word Taraf, which is only a subdivision of a Pergunah. We do not accordingly see any force or substance in Mr. Sen Gupta's argument.

Mr. Sen Gupta's argument on the area basis is as follows. The Rakbabandi filed in 1799-1800 (Ex. 1 ; B14-16) mentions the area of Taraf Udaynagore to be 21221 Bighas, 6 Cottas, 12 Chittaks. The Bigha as prevalent at the time in Purgunah Goas was much larger than the standard Bigha, each Bigha being no doubt of a *rasie* of 80 cubits, but each cubit was 28 inches and not 18 inches as in a standard bigha. The area mentioned in the Rakbabandi would accordingly be 50930 odd standard Bighas. The measurement of the villages of the said Taraf at the time of the Revenue Survey of 1850-54 came up to about 8960 acres. This figure is obtained by adding up the areas of Atarpara, Poreshpur *alias* Badarpore, Udaynagore, Udaynagar Diar, Tamadia, Chowmadia and Ramnarayanpore—villages shown as appertaining to Taraf Udaynagore in the Rakbabandi Exhibit 1. The areas of these villages at the time of the Revenue Survey are mentioned in the Exhibit PP. 4 (B 158) and Exhibit P 5 (B 164 and 175) under the heading of "Old" measurement. This area converted to standard bighas comes to about 26900 bighas. The decrease of about 24030 standard bighas (50930-26900) at the time of the Revenue Survey of 1850-1854 he attributes to the river Padma encroaching at that time of Taraf Udaynagore. The Rakbabandi according to him was

(1) (1906) 3 C. L. J. 560.

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a return which the zemindar was required to file under rule which had subsequently been enacted as Regulation VIII of 1800, for showing in detail the assets of his zemindary as settled by the Permanent Settlement of 1793. The whole foundation of this argument rests on the assumption that in 1799-1800, when the Rakbabandi was filed with the Collector, the measure prevalent in Pergunah Goas was a rod of 28 inches.

To support his argument Mr. Sen Gupta refers us to the Dastur Rewaz, a return made by the Kanungo to the Collector in the year 1819-1820. Two copies have been filed, one by the plaintiff [Exhibit 2 to 2 (9), B 52-110] and the other by the defendants [Exhibit B to B(4), B 111-140]. The entries under the heading "Prevailing Rashie or rod of measurement" are important. In Exhibit 2 series, those entries have been translated thus "Measurement is made by a Rashie of 80 cubits, each cubit being of the full length of the arm up to the shoulder" (B 105). In Exhibit B series the translation is "measurement is made with a Rashie of 80 cubits inclusive of *hatkanda*". The vernacular words in both series of Exhibits run thus: "*Rashie mai hatkanda Asi dastite rashie* ("Rashie with *hatkanda* 80 cubits a rashie"). The word *hatkanda* has been translated in Exhibit 2 series as the full arm's length or the full length of the arm up to the shoulder, and has been made to qualify the word *dasti (cubit)* and not the word *rashie* (rope). In the vernacular the word *hatkanda*, however, qualifies not the word *dasti* but the word *rashie*. The sense is brought out in Exhibit B series (B 111 to 140), as the literal translation made by us would show. The meaning is that in measuring the practice was for the men holding the rope at both ends to tie the ends round their shoulders *(hatkanda)* and not to hold it with outstretched arms, so that each *rashie* included just 80 cubits and not 80 cubits *plus* the length of two outstretched arms. Even if the word *hatkanda* qualifies the word *cubit* there is no evidence to show that such a cubit was taken to be 28 inches in length.

It is in evidence that in an almirah kept at the Collectorate, many old measuring rods have been kept. Some were of brass and some wooden rods and they varied in length from 6 inches to 36 inches. This is shown by the Register, Exhibit Q (F 2022). In 1910 on the application of the appellant a certified copy of a rod of 28 inches was issued over the signature of a Deputy Collector. In the certified copy it was mentioned that it was the rod of measurement of Touzi No. 523, Perguna Goas (Exhibit 5, C 728). The rod in question was produced in Court in this case and inspected by

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the Court. There was nothing to show that it was the measuring rod of Pergunah Goas (see evidence of Sarat Chandra Ghosh, A 102). The certified copy was produced by the appellant in 1915 in a case which it had filed against the Secretary of State (Suit No. 485, of 1910). On that an enquiry was started as to the correctness of the copy. The enquiry was conducted by the Deputy Collector, Mr. Krishna Kali Mukherjee. He found that the copy was a spurious one, in the sense that there was nothing in the Collector's record to justify what had been stated in the copy, that it was either the *hatkanda* rod, or had reference to Pergunah Goas. The copy was condemned as unauthorised as a result of his enquiry. The copy seems to have been called back and on it a note was made that it was a spurious one. (There is a mistake in the print at C 728, the word 'specimen' being a misprint for 'spurious'). The clerk who had issued the same was removed. Mr. Mukherjee's evidence in Suit No. 485 of 1910 is Exhibit 19 (C. 460). It has been tendered by the appellant company and has been marked as an exhibit at its instance. Mr. Sen Gupta relies on an answer given by him which runs thus: "The *hatkanda* measurement rod is equivalent to 28 inches" (C 461, L 35) and says that apart from the question of the spuriousness of the copy Exhibit 5, this admission proves his case to the extent that a *hatkanda* rod is a rod of 28 inches and that is enough as in the Dustur Rewaz (Exhibit 2 and Exhibit B series) the entries show that the *hatkanda* standard of measurement was prevalent in Pergunah Goas. We do not, however, think that Mr. Mukherjee in his answer gave the measure of the *hatkanda* rod. The answer must be taken with the question (C. 461 L. 15) which was "what information was supplied to the agent of the Midnapore Zemindary Company with regard to which he made the enquiry." The answer taken with the question accordingly means that the *information* supplied which was the subject matter of his enquiry, was that the *hatkanda* measurement rod was equivalent to 28 inches, an information which his enquiry disclosed to be incorrect and unauthorised and may have been the result of some underhand dealing between Purna Chandra Chatterjee a revenue agent and Ammuktear of the Company and the record keeper Radha Sundar Mitter (Exhibit 21 C. 482). The evidence given by Sarat Chandra Ghosh, Assistant Record keeper, (A. 80) does not further the appellant's case on the point. The case that Taraf Udaynagore lost a considerable area of land at the time of the Revenue Survey is not accordingly established. Much less has it been shown that the alleged loss was due to the encroach-

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ment of the river. We will also hereafter point out that the position of the river in 1850-1854 was almost at the same place in this locality as at the time of the Decennial and Permanent Settlements.

At one stage of the argument Mr. Sen Gupta referred to the boundaries of Taraf Udaynagore as given in the Dastur Rewaz (B. 105-107) and submitted that the entries in the last column indicate that there was no river there. Section 7, fifth, of Regulation V of 1816 casts the duty upon the Kanungo to compile informations regarding the local boundaries of estates and Pergunahs in the District of Katak and Palaspore. Regulation I of 1819 authorised the appointment of Kanugoes throughout the Province of Bengal. By Regulation II of 1817 the reform of the office of the Patwaris was made. Section 16 required them to keep registers and accounts relating to villages and to deliver such accounts to the Kanungo every six months. The Dastur Rewaz filed in this case seems to be the statement of the account, village by village, furnished by the Patwaris to the Kanungoes. It does not seem clear whether a Kanungo or a Patwari was required to note the existence of a public river when such a river did not form the boundary either of an estate, Purgunah, *taraf* or village, but went through them. The non-mention of the river in the remark column, which was only meant to contain a description of the boundaries, does not necessarily lead to the conclusion that the river Padma was not within Taraf Udaynagore. It moreover appears to us that the boundaries of Udaynagore as given at B. 105-107 cannot be satisfactorily interpreted. The boundary marks mentioned therein can be traced in Smart's map of 'Pergunah Goas prepared in 1853-1854 [Exhibit 28 (43)—Map 46 M(2)]. But then according to the Dastur Rewaz, Taraf Udaynagore would occupy the place which looks like South Africa, a position which would be far away, about 10 miles to the south-west of its actual site. It would further appear from the boundaries of Taraf Ikuri, which is admittedly to the north and west of Taraf Udaynagore that the river Bara Padma (flowing river Padma) was partly on its eastern and partly on its southern boundary. Having regard to relative position of the two Tarafs formed also a compact block of land the conclusion would be that the said river was then flowing through Taraf Udaynagore (we read, as Mr. Sen Gupta suggests the words "to the west" as "to the west of" etc.). Then we pointed out these things to Mr. Sen Gupta; in the course of his argument he admitted that from the entries in the Dastur Rewaz he cannot say that in 1819—1820 the flowing river was not inside Taraf Udaynagore.

The terms of the patni *potta* of the 8th April, 1836 [Exhibit 6(b); B. 148] do not in our judgment support the contentions of Mr. Sen Gupta. Taraf Udaynagore, as we have already pointed out, does not signify a compact block of land not intersected by a river. The villages making up the said Taraf were known and a grant of the said Taraf would only mean a grant of the said villages. In such a document the express mention of the river Padma would not be necessary or required. So from the mere non-mention of the river we cannot safely infer that the river was not in the Taraf. On the other hand the mention of and inclusion in the grant of two ferry ghats would indicate that the flowing river was there. It would only help Mr. Sen Gupta if the ferry ghat of Atarpara was on the eastern limits of the said village. If it was on its western limits the river must have been flowing in between Atarpara on the east and the other villages of Taraf Udaynagore on the west. Every thing indicates that before 1850-1854 the river was not so far to the east as to be quite outside of and to the east of village Atarpara. This document is accordingly of no help to Mr. Sen Gupta.

Mr. Sen Gupta has further referred us to the last column of page 836 C, of the Mahalwar register of pergunah Goas District Murshidabad (Exhibit 25). That register was prepared on the basis of the Thak Survey which just preceded the Revenue Survey of 1850-1854. The serial number of Mouza Udaynagore Taraf is 504, and the last column shows that the lands of the said Taraf were measured in Thak *halkas* 37, 57, 61 and 378, and the Mouzas appertaining to the said Tarafs were numbered as 6, 7, 9, 14, 101, 113, 154, 227, 287, 293, 309, 360, 50 etc. in the said register. The further remark was that those Mouzas had been surveyed "without demarcation of boundaries." From this remark Mr. Sen Gupta argues that at the time of the Thak survey which was about a year or so before the Revenue Survey the Mouzas of Taraf Udaynagore had formed a compact block of land and the river came upon the lands of the said Taraf and divided its Mouzas on two banks between the Thak and Revenue survey. He tries to get an additional support for this argument of his from the observations made in the judgment of Morris, J. to the effect that the river was rapidly changing its position in the District of Rajshahi between the two surveys, the Thak and the Revenue Survey [Ex. 12 (4), B 260 at 262 L 10-15]. We do not think that this contention of Mr. Sen Gupta is right.

The remarks in the Mahalwar Register can only mean that where the villages of Taraf Udaynagore lay side by side, as for

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instnnce Atarpara, Chowmadia and Tamadia, or Udaynagore Diar, Ramnarayanpara and Udaynagor, the boundaries were not demarcated *inter se* as they all appertained to the same Taraf. The Thak Halka numbers are noted on the Revenue Survey maps ; No. 378 in heading of the revenue survey map of Udaynagore [Ex. 28 (5)—map 8 M (1)], No. 61 in the Revenue Survey Map of Udaynagore Diar [Ex. 28 (8) map 11 M (1)]. The Thak Survey of the lands on the eastern bank of the river, the lands in Rajshahi District, had been made in 1847-48 and the Revenue Survey was completed in 1849-50. The Revenue Survey of Udaynagore Diar and of Udaynagore had been completed in January and April 1854 [Map No. 11 and 8 M (1)]. The Thak Survey of these two villages must have been completed a year or so before, that is in 1852 or 1853. Even before then the river was shown as flowing immediately to the west of Atarpara, Chowmadia and Tamadia which were Revenue Surveyed in April 1851 [Ex. 28 (3), map 6 M (1) Revenue Survey map of Chowmadia, and Ex. 28 (4), map 7 M (1), Revenue Survey map of Atarpara]. The judgment of Morris J. shows no doubt that the river was changing between 1847-48 and 1849-50, but the Revenue Survey of 1849-50 was taken to be a correct representation of the locality on the eastern bank of the river and the judgment proceeded thereupon. The said Revenue Survey showed, as we have already pointed out, that the river was to the immediate west of Atarpara, Chowmadia and Tamadia and so separated them from the other mouzas, Udaynagore, Udaynagore Diar etc. which were on the other, the western bank, of the river.

The explanation of the remarks in the Mahalwar Register of District Murshidabad is apparently that such lands of Udaynagore, Udaynagore Diar, Ramnarayanpara and other villages as are said to have been measured in Mouza Udaynagore Taraf and as were found to the west of the river at the time of the Thak Survey in that region had been included in No. 504 without demarcation of boundaries. Against each separate entry of the villages no separate area is shown, but the total area of 3379 acres was quite inadequate to include the areas of Atarpara (1255 acres), Chowmadi (1713 acres), and Tamadia (2383 acres) alone [which areas we find from the Revenue Survey maps of Rajshahi District and from the Deara Thakbast (B. 158 *et seq.*)], apart from the question of the area of Mouza Udaynagore itself, and the other villages which were admittedly in Murshidabad and to the west of the river.

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We cannot hold accordingly that the river at the time of the Thak just before 1854 was not separating the Mouzas of the Taraf Udaynagore but had only come upon it by a violent and sudden change in the course of a year or so. The first line of the appellant's argument fails. We hold that it has not been established that the villages of Taraf Udaynagore formed a compact block of land at the time of the Decennial and Permanent Settlements and that the bed of the Revenue Survey river was dry land at that time.

II. We now proceed to examine Mr. Sen Gupta's second line of argument. Mr. Sen Gupta begins by saying that in 1790 or so the river Padma was to the east of and beyond the limits of Pergunnah Goas, and that Pergannah Laskerpur was further to the east of the river. In support of this he refers to the Fifth Report of the Select Committee of the House of Commons on the affairs of the East India Company at page 337 of the original edition where Goas is shown in Chakla Murshidadad of the Zemindari of Rajshahi in the year 1135 B. S. (1728)—Pargunah Laskerpur is also shown, and it is clear that the zemindari extended over a very large area on both sides of the Ganges or Padma (Fifth Report. 336 and 263 original edition and Hunter's Statistical Account of Bengal, Vol. 8, p. 20). The argument then refers to the volume of Hunter's Statistical Account of Bengal, relating to Rajshahi (Vol. 8 at P. 21) where it is mentioned that in 1793 the old District of Rajshahi was divided up and the river Padma was made the boundary between Rajshahi District on the east and Murshidabad and Nadia on the west and south respectively. It is therefore argued that Perganah Goas was included in the western districts and Pergunah Laskerpur in Rajshahi on the east. Reference was also made in support of the argument to remarks in the case of *Rani Hemanta Kumari* v. *Secretary of State* (1), and the statement in the judgment of Morris, J. in the case of *Sarat Sundari Debi* v. *J. W. Laidlie and others* (B 260) that the suit before him was 'an attempt to adjust the boundary line of so much of the zillahs of Rajshahi and Murshidabad as divides the co-terminous estates of the two parties,' namely Pargana Goas, and Pargana Laskerpur. The argument has no force. It may be quite correct to say generally that the boundary between two estates is the river Padma, but this cannot be exclusive of the chance that at the time when the river is taken as such boundary some small portion of one estate may

(1) (1906) 36 C. L. J. 560 (568).

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have been cut off by the river from the rest. When Rajshahi and Murshidabad were separated in 1793 the boundary was taken as the river regardless of the question whether a small portion, say, of Mouzas Atarpara, Chowmadia and Tamadia of Pergunah Goas might be on the Rajshahi side of the river; the statement that the river divides the Pergunahs of Goas and Laskerpur is still correct in its general terms, but is no evidence that the river was wholly to the east of Goas. As regards the statement of Morris, J. it is quite clear that he was not in any way concerned with the question of the position of the river in 1793. He was dealing with the Revenue Survey boundaries between the villages of Pergunah Goas on the west, namely, Atarpara, Chowmadia and Tamadia, on the one hand, and the villages of Laskerpur Pergunah, namely Alaipore, Kishorepore etc. on the other. He relied on the fact that at the time of the Revenue Survey, and even at the time of the Diarah Survey, some portions of Atarpara, Chowmadia and Tamadia remained on the east of the river, and the disputed lands in the case were therefore either re-formations of part of these villages or accretions to them; in no event could they be accretions to the Laskerpur villages. He also was concerned to settle some minor disputes as to the actual boundaries between the two sets of villages; but nothing in his judgment has any bearing on the question we have to consider in the present case as to the position of the Permanent Settlement River.

A reference was made by Mr. Sen Gupta to Rennel's map and Colebrook's map [Ex. Z—Map No. 50 M (2); Ex. 28 (1) Map No 4]. He contends 'that the disputed lands were in the island of Nipara as shown therein. He first submitted that the village Surdah is a fixed village which has not undergone any change in site. It has brick-built ancient buildings which are still there (District Gazeteer of Rajshahi page 185). The village Harisankar in the south is also a fixed place. For showing this he relies upon the finding of the Judicial Committee of the Privy Council in *Kumar Naresh Narayan Roy* v. *Secretary of State for India in Council* (1). That is not an *inter partes* judgment and so that finding cannot be evidence in this case. But assuming that Harisankar is a village that has never undergone any change in site, the appellant's case on the point is not advanced. What he wishes us to do is to superimpose by reference to Harisankar and Surdah Rennel's and Colebrooke's maps on Smart's map of 1853, which practically agrees with the Revenue Survey map of 1850-54

(1) (1923) L. R. 50 I. A. 121; 28 C. W. N. 453 (456).

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(Map No. 46). Harisankar is not shown in Smart's map but he asks us to put it on Smart's map by measuring the distance from Surdah and from Jellanghy. He even goes to the length of saying that it would serve his purpose if we seperimpose the maps by reference to Surdah only, keeping in with the north line. We cannot allow him at this stage to proceed in that fashion. If his case was that the disputed land was a part of the island of Nipara he ought to have asked for a local investigation in the lower court and to have the relay done by a Commissioner from a satisfactorily established fitting point. When we indicated this view in the course of the argument his reply was that as there were admissions, for instance in Ex. 11-(G.—1), by the defendants that the lands of Touzi No. 512 were reformations *in situ* of the lands of Touzi No. 523, he was relieved of the duty of applying for local investigation and for having the relay done by an expert and it was for his opponent to do so. We do not think that this is the correct position. The plaintiff company is not relieved of producing the best materials in support of its case, as no admission had been made by the defendants either in their written statement or at the hearing. (Section 58 of the Evidence Act). For the purpose of superimposition copies of the relevant maps have been made in this Court on the same scale. Their superimposition from Surdah would, however indicate that a good portion of the disputed land may fall within the island of Nipara, as shown in Rennel's map but the major portion would fall outside that island as shown in Colebrooke's map. We are, however of opinion that it would not be safe to come to a conclusion in favour of the appellant on such a comparison. The former map has been prepared on a small scale. In both only the village sites are shown, and then only approximately. For instance the relative positions of Surdah and Jellinghy are different in the two maps. Mahuddypore is shown at different places in the two maps. The extent of the villages are not shown. Whether in view of these factors even a relay of these maps by an expert commissioner would not have afforded a safe and sure criterion we are unable to say, but if the appellant company wished to rely on the maps for the purpose of determining with the maximum degree of precision the exact position of the 1789-1793 river in relation to the disputed land it was for it to have enlisted the services of an expert. We accordingly cannot hold that the disputed land was within the island of Nipara as depicted in these maps. We are however of opinion that the position of the river

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at this part in 1793 can by this method of rough comparison be determined with sufficient accuracy for us to say that it was not substantially different from its position at the time of the revenue survey in 1850-54. This would be apparent by a general comparison of Colebrook'es map with Revenue Survey map No. 22 (M1). The northern portion of the river from Hazrabatty to Muhadeepore is almost at the same place, only the breadth had become narrower in 1850-54. In both the maps we have both those villages on the eastern bank and quite close to the river. In both of them we have Shahebnagore, Azimpore (marked as Adempur in Colebrooke) and Udainagore Diar (this is marked as Oodaynagore in Colebrooke) on the western bank and quite close to the river. In both the maps the river takes here an almost straight southerly course. The southern portion of the river downwards Muhadeepore also tally—only the river has shrunk. Colebrooke's map was of 1796-7, but it shows the course of the river in previous years. The main channel of 1794 was by Chowlhatta, Jellinghy and Dewanganj, but there was an eastern channel over what has been shown as an island, with the remark that it had "formed by the river deserting its former channel since May 1795". This was accordingly the channel of the river up to 1794. That channel from Muhadeepore downwards can accordingly be traced in Colebrooke's map. It passed along the west of Chowmadia as shown there and a little to the east of the main channel of 1795. More of the southern part of the river is shown in Smart's Map of 1853 (Map No. 46) than in the Revenue Survey Map No. 22 (M 1), but the position of the river is the same in both of them. A comparison of the revenue survey map—map No. 22, and Smart's map (Map 45) with what we have indicated as the river channel up to 1794 in Colebrooke's map would show that there was very little change in the position of the river at the aforesaid periods 1794 and 1850-54. As it would be safe to presume that the river of 1794 was the river of 1793 or 1789 Colebrooke's map instead of supporting the appellant would lend considerable support to the respondent's case that the disputed lands were in the river bed at the Decennial and Permanent Settlements. At any rate, the evidence provided by the maps is entirely opposed to the appellant's main case that the river of 1789-1793 was entirely outside Taraf Udaynagore. We have with consent of the parties placed on record a semi transparent copy of Smart's map which is only the same scale as Colebrooke's. For identifying the same we have marked it with letters "S M" and have initialled the same.

There is nothing to support the appellant's suggestion that the main channel of the river. flowed in and before 1793 over the space covered by the two parallel lines immediately south of Nawabgange, Bauleah, Tungunge, and its continuation over the space to the immediate west of Surdah, Chargat, Chandsur, Huzzerahatty, Mahuddypore and then through the space represented by the parallel lines in between Allypore, Murkutty, Meergang on one side and Chowmadia, Monympoordera-Laskarpoor-Sadasypoore and Bewany-Dearah on the other.

On the basis of the plaints of Suit No. 62 of 1876 and of Suit No. 77 of 1877 [Exhibit 16, B 244 and Exhibit A(a), B 248] and of the judgment in the last mentioned suit [Exhibit Y(1)—B 250] Mr. Sen Gupta contends that the lands of Chak Mathuranath and Sagorepara extended at the time of the Decennial and Permanent Settlements right up to the borders of Hazarahatty. We do not see any force in this argument. In the first mentioned suit the lands were claimed by the plaintiff as being partly reformation *in situ* of the lands of Chack Mathuranath which had been washed away after 1871 and had again re-formed thereafter, and partly as accretions thereto. The boundaries of Chack Mathuranath as given in the Thak map of 1853 were relied upon by the plaintiff to support his claim, and it was stated that its eastern boundary was the river Padma as at the time of the Thak. The Revenue Survey Map of 1850-54 (Map No. 22) shows the position of that river. The suit was decreed on the basis of the Revenue Survey Map of 1850-54, which was relaid on the case map (Map No. 52). Mr. R. C. Sen's map [Map 28 M(1)] would show that the Diara river, i. e., the river in 1867-68 had cut into a part of Udaynagore Diar as shown in the Revenue Survey Map and what the plaintiff in that suit was claiming as re-formation *in situ* of Chack Mathuranath was a portion of the land which had been shown as firm land of Udaynagore Diar in the Revenue Survey but which had since diluviated and had again re-formed. Chak Mathuranath was a part of Udaynagore Diar.

The plaint of the last mentioned suit also speaks the same story. The claim on the ground of re-formation *in situ* and of accretion was also based on the Survey Map of 1853. That is to say it was admitted by the plaintiffs of that suit that the limits of Sagorepara had to be determined on the basis of that map. The land claimed in that suit was the portion over which the river had encroached since 1853. Mr. R. C. Sen's map (Map 28) makes the position clear by showing that in 1867-68 the river had gone further west of the Revenue Survey river.

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We would now deal with the alleged admissions of the contesting defendants and their predecessors-in-interest.

On the basis of the Diara Survey of 1867, the lands in suit together with other lands were held as accretions to the lands of Touzi No. 523. A new Touzi was formed and assessed to revenue. James Dalrymple and John Watson Laidley, who were also partners of Robert Watson & Company, took a permanent settlement of the said Touzi on the footing that it was accretion. From the very beginning the lands which formed Touzi No. 512 were thus treated not as re-formation *in situ* but as accretions to Touzi No. 523. The appellant seeks to explain away the effect of the Diara proceedings of 1869 by saying that the lands were treated in fact as re-formation *in situ* of the lands of Touzi No. 523, but on an erroneous view of the law then prevailing were held by the Diara authorities to be accretions or "added lands", for the law of re-formation *in situ* was only correctly formulated and properly understood after the judgment delivered in 1870 in *Lopez* v. *Madan Mohan Thakoor* (1). The contrary view held the field up to 1870 as is apparent from the Full Bench decision in *Kattemonee Dossee* v. *Ranee Monmohinee Dabee* (2) and from the observation of the Judicial Committee in *Secretary of State* v. *Krishnamoni Gupta* (3) which implies that *Lopez's* case (1) brought about a change in view of the law on the subject. There is, however, nothing to show that Mr. Bhagaban Chandra Sen proceeded upon that footing, (Exhibit F, B 191). The Kabuliat [Exhibit M(1)—B 197) executed by James Dalrymple and John Watson Laidley is sought to be explained on the basis that at that time it was thought that a proprietor was liable to pay additional revenue for the lands which were found on comparison of the Revenue Survey Map and the Diara Map to have been inside the river as depicted in the former, though they may have been lands actually included at the Permanent Settlement of 1793. For the purpose of showing what was understood as the law up to 1886, reference was made to *Sarat Sundari* v. *Secretary of State* (4), and to the Full Bench decision in *Fahamidannissa Begum* v. *Secretary of State* (5), which overruled *Sarat Sundary's* case (4). This argument assumes that James Dalrymple and John Watson

(1) (1870) 13 M. I. A. 467 ; 5 B. L. R. 521 ; 14 W. R. P. C. 11.
(2) (1865) 3 W. R. 51 F. B. ; B. L. R. Supp. 353.
(3) (1902) L. R. 29 I. A. 104 (117) ; I. L. R. 29 Calc. 518 (536).
(4) (1885) I. L. R. 11 Calc. 784.
(5) (1886) I. L. R. 14 Calc. 67 affirmed in L. R. 17 I. A. 40 ; I. L. R. 17 Calc. 590.

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Laidley knew in 1870 that the lands of Touzi No. 512 were in fact parts of the permanently settled estate No. 523. Of this there is no evidence. The evidence furnished by Diara proceedings and by the conduct of James Dalrymple and John Watson Laidley who were also partners of Robert Watson & Company, the predecessors of the appellant, is accordingly against the contention of the appellant. The *patnidars* Robert Watson & Company however treated their *patni* with a rental of 1975 odd as extending over the lands of both the Touzi Nos. 523 and 512 [Exhibit 27, B. 272 at 281). In the conveyance by which the Dudhurias purchased from the successors-in-interest of James Dalrymple and John Watson Laidley, the assets were calculated on the basis that the said *patni taluk* included the lands of the Touzi [Exhibit 27(c), B. 285 at 297 and 298). In the conveyance, however, the two Touzies were dealt with as separate entries, each as an independent item of property, and Touzi No. 512 was expressly stated to comprise *accreted* lands (B. 290). The Dudhurias applied for registration and caused their names to be registered in the Collector's Register in respect of both the Touzis Nos. 523 and 512. [Exhibit 3-B 313, Exhibit S(3)-C. 849, Exhibit S, C. 840 and Exhibit S(1), C. 843]. At this time and up to 1903 they did not treat Touzi No. 512 to be merely a part of Touzi No. 523. On the 5th May, 1904, however, they made an application to the Collector for excusing them from filing a separate road cess return for the lands of Touzi No. 512 (Exhibit 11-G. 1). In that application they stated that Touzi No. 512 had been created in 1870 by taking the lands of Touzi No. 523, that Touzi No. 512 was another appearance of Touzi No. 523, and all its lands were really lands of Touzi No. 523. This application contains a clear admission by the Dudhurias that the lands of Touzi No. 512 were the re-formations *in situ* of the lands of Touzi No. 523. This application was apparently granted and the Dudhurias filed one cess return for both the Touzis on the 6th September, 1904 [Exhibit 10(a)-C. 730). At page 748 a statement was made that all the lands of both the Touzis had been let out in *patni*. Khem Chand Chowriar (there is a misprint of the name at page 748) who was one of the Am-muktears of the Dudhurias and who verified the return has been examined for the purpose of explaining away the return (A. 112). The explanation which he has attempted, that he did not know of the contents of the return, as neither he nor the other Am-muktar Joshi could read Bengali is unbelievable, as in cross-examination he admits that he can read Bengali. The return must have been written by the filing *muktear*

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on the instructions of a responsible agent of the Dudhurias. On the 5th March, 1907 another road cess return was filed by the Dudhurias (Exhibit 10—B. 428). In it also an unequivocal admission was made to the same effect as in Exhibit 11. These admissions (if they had been the only items of evidence) would have been almost conclusive against the defendants. They would have great weight unless either explained away or shown to be wrong. The purpose of filing one return with a statement that Touzi No. 512 had no assets apart from those of Touzi No. 523 was to lighten their liability for cess. In our judgment the weight of these admissions has been nullified by the explanation furnished by the full evidence which we have as to the formation of Touzi No. 512 in 1870. The Dhudhurias were concerned to avoid assessment to further cess, by pointing out that all the assets of Touzi No. 512 were included in those of Touzi No. 523. Their further statements are unsupported by the history of the facts and have no foundation. The only way in which it could finally have been determined, if at all, that the lands of Touzi No. 512 were actually the lands of Touzi No. 523 was by exact ascertainment of the position of the 1789-1793 river (we have already seen that the position cannot be determined on the evidence before us with sufficient precision). To know that it is a nice question as to what would be the final result of an exact determination of it. It is to be remembered too that the Dudhurias were subsequent purchasers and were not in possession necessarily of the same full information as to this matter as their predecessor or as the appellant for that matter. Even as late as the year 1921 the appellant proceeded upon the basis that the Revenue Survey Map 1850—1854 correctly delineated the village of Taraf Udaynagore of Touzi No. 523. (Paragraphs 2, 4 and 6 of the plaint of Suit No. 21 of 1921 Exhibit U. C. 492). The settlement records no doubt record the lands both of Touzis Nos. 512 and 523 as within the plaintiff's *patni* but as the lands thereof were kept separate and distinct and expressly recorded either as within the one or the other Touzi we do not think that these records afford any evidence on the question as to whether the lands of Touzi No. 512 were re-formations *in situ* of the lands of Touzi No. 523. We accordingly overrule this line of argument.

III. There can be no doubt that Robert Watson & Company were in possession of the lands of Touzi No. 512 since their formation on the assertion of their *patni* rights. That fact is recorded in the Diara Map of Udaynagore of 1868 [Exhibit 28 (12) Map No. 15 M(1)]. There is no evidence that the said Company abandoned its

possession subsequently and that the then proprietors, James Dalrymple and John Watson Laidley, took possession. There is no documentary evidence in the shape of Kabuliats or other papers to show that the latter settled tenants or possessed any portion in Khas. In the conveyance which Robert Watson & Company executed in favour of Robert Watson & Company Limited on the 26th May, 1890 (Exhibit 27, B 272) the vendors' possession of the lands of Touzi No. 512 on an assertion that they were within their *patni* Taraf Udaynagore is shown (B. 281). In the conveyance by which the Dudhurias purchased in 1893 the zemindary interest in Touzi Nos. 512 and 523, the assets are calculated on the basis that the said *patni* covered the lands of both the Touzis [Exhibit 27(c), B. 285 at 297-298]. The income of the zemindars from *hudda* Ikuri which includes Taraf Udaynagore is stated to be Rs. 2171-5-7½ (B. 297). The *hastabud* of the *patni* comprising the said *hudda* is stated to be Rs. 8899-11-2. The Sudder *jama* (revenue) payable by the zemindars in respect of the said *hudda* is calculated at Rs. 6728-5-7½. The figure is not stated in the relevant column at page 297 but the calculations are in the next two pages. The balance of Rs. 2171-5-7½ was accordingly mentioned as the profits. The calculation at page 298 is significant. The *hastabud* (i.e. *patni* rent payable) of the several *patnis* in *hudda* Ikuri is mentioned in detail. The total comes to Rs. 8899-11-2. There is a mistake no doubt with regard to the *patni* rent of Udaynagore. It ought to be Rs. 1975 odd and not 2055-9-1. The mistake crept in by not converting the *patni* rent of Rs. 1201 (sicca) of Jelangi *hudda* as mentioned in Exhibit 6(b), B. 148 into Company's coin. But that mistake is not material for the point we are considering. The figure Rs. 6728-5-7½, which was mentioned as the revenue of the said *hudda* Ikuri must have been derived in the following manner :—

Rs. 7583-3-9½	(Revenue assessed at the Permanent Settlement, the sum mentioned in Rokbabandi, that is, Rs. 7111-0-6½ (Sicca) converted into Company's coin (Exhibit 1, B. 14-16).
Rs. 3177-10-0	(Revenue assessed on Touzi No. 512 Exhibit M. B. 197).
Total 10760-13-9½	
Less 4032-4-3¼	(Remission of revenue granted in 1870 on account of diluvion of the lands of Touzi No. 523 (Exhibit L. 3, F. 2009-2011).
Rs. 6728-9-6½	

The difference is about 4 annas which may, however, have been due to a little miscalculation. This indicates that the *patnis*

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were treated as covering the lands not only of *hudda* Ikuri within Touzi No. 523, but also the lands of Touzi No. 512 and that the *patnidars* were in enjoyment of the last mentioned lands. In the cess returns [Ex. 10 (a) Ex. 10 (C 730 and B 428)] the Dudurias admitted that all but 13 Big. 14c-8 chittaks of land, were in the possession of the *patnidars*. The settlement records prepared under Chapter X of the Bengal Tenancy Act and finally published in 1920 and 1921 record the possession of the appellant as *patnidar* in such portions of the lands of Touzi No. 512 as were then dry. It has accordingly been conclusively proved that the appellant and its predecessors were all along in possession as *patnidars* of the lands of Touzi No. 512 and were paying to the Dudhuria a patni rent of Rs. 1975-8-1. Whether the appellant company would be liable to pay additional rent for possessing the lands of Touzi No. 512 as part of its Patni over Asli Taraf Udaynagore is a question outside the scope of this suit. We cannot also believe the defendants' case that the lands of Touzi No. 512 so far as Udaynagore was concerned went under the river immediately after their formation in 1867-68 and continued to rise up, and go down under, the river bed at short intervals. This case is to some extent against paragraph 10 of their written statement as amended and is moreover not supported by any evidence.

The evidence of Kefatulla Sarkar (A. 94) on which the respondents have relied deals not with the diluvion of village Udaynagore, but of portions of the village Atarpara in or about 1869 or 1870. From this long possession the appellants' Advocate wants us to draw an inference not of fact but of law to the effect that the lands of Touzi No. 512 were but lands of Touzi No. 523. For this purpose he relies upon *Forbes* v. *Meer Mahomed Hossein* (1); *Secretary of State* v. *Durbijoy Singh* (2); *Haidar Khan* v. *Secretary of State* (3) and *Secretary of State* v. *Maharaja Radha Kisshore Manikya* (4). These cases do not support him. The first case laid down the proposition that long possession is proof of title. There the question was whether the *jalkar* in question was a part of a tenure which had been created before the Permanent Settlement and so protected from the attacks of the purchaser of the zemindary at a revenue sale. It was held to be

(1) (1873) 20 W. R. 44 P. C; 12 B. L. R. 210
(2) (1891-92) I. L. R. 19 Calc. 312 P. C; L. R. 19 I. A. 69.
(3) (1908) I. L. R. 36 Calc. 1 P. C; 8 C. L. J. 436.
(4) (1916) 25 C. L. J. 425; 21 C. W. N. 291 P. C.

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so on the ground that the tenure-holder was possessing it as such for a long period. In the second case the question was whether the lands in suit had been included in the previous *inter partes* decree. The decree had not defined with precision the lands decreed. It was held that possession of the lands in suit given to and taken by the decree-holder and retained for a long time on the basis that it was included in the said decree was relevant for the purpose of defining the lands so decreed. In the third case the question was whether Regulation III of 1891 (Assam) could be enforced in respect of the *Jhum* lands in suit. That could be done only if the said lands were at the time of the Parmanent Settlement beyond the limits of the estate so settled its assets had been taken into consideration on account of Jhum cultivation. If however the said lands were included within the limits of the estate permanently settled the said Regulation which was expropietory in nature could not be invoked. The Judicial Committee held that long possession coupled with other important evidence furnished by the proceedings of 1842 and 1843 raised the inference that the said lands had been included within the limits of the respondent's permanently settled zemindary. In the fourth case the question was whether a long strip of land between two hilly spurs had been included in the respondent's permanently settled estate. That portion had not been shown in the Revenue Survey of 1859 as part of the respondent's estate. On this fact Government contended that it was not part of the respondent's zemindary. It was established in fact that it was not subjected to survey operations at all in 1859, being a strip of jungly land on the borders of the British territory and the territory of an independent Chief. In those circumstances it was held that long possession by the respondent outweighed the negative evidence furnished by the Revenue Survey map. These cases are of no help to the appellant company. Long possession would raise the inference of its title to possession, but it would afford no basis for the further inference that that title rested on re-formation in *situ* and not on accretion. We overrule all the three lines of argument advanced by the appellant's Advocate to establish that the lands in suit are re-formations in *situ* of the lands of Touzi No. 523 as permanently settled in 1793.

We find that the lands in suit are not re-formations in *situ* of Touzi No. 523 (a) because the case made in the plaint that the river was outside Taraf Udaynagore at the time of the Decennial and Permanent Settlements has not been proved ; (b) because the case that they were within the island of Nipara has not been

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proved, as the precise position of the river in 1789 has not been established; and (c) because the admissions made by the Dudhuria in Ex. 11 and Ex. 10 have been explained by the contesting defendants.

The case of estoppel has been presented before us by the learned Advocate for the appellant under two heads:

(1) that defendants cannot be allowed to show that the lands of Touzi No. 512 are not the re-formed lands of Touzi 523,

AND

(2) that the defendants cannot be allowed to show that the plaintiff has no *patni* right in the lands of Touzi No. 512 and so in the disputed area.

The second head need not be considered in view of what we would hold on the plaintiff's alternative case based on accretion.

We do not think that the defendants are estopped from asserting that the lands of Touzi No. 512 are not re-formations *in situ* of the lands of Touzi No. 523. Between 1870, when the new Touzi was created, and 1890, the zemindars were James Dalrymple and John Watson Laidley or their successors-in-interest and the *patnidars* were Messrs. Robert Watson & Co. During this period there is no evidence of any representation made by the zemindars to the effect that Touzi No. 512 was created out of the lands of Touzi No. 523. Over and above this Robert Watson & Co. knew that the lands of the Touzi No. 512 were treated as accretions and were settled with Dalrymple and Laidley on the basis that they were accretions. The zemindars between 1890 and 1893 were the representatives of James Dalrymple and John Watson Laidley, who were then dead. In 1890 the *patni* interest passed from Robert Watson & Co. to Robert Watson & Co. Ltd. There is no evidence of such a representation being made by the zemindars in this period. In 1893 the Dudhuria became the zemindars and in 1902 Crawford purchased the *patni*. During this period there was also no representation by the zemindars. A statement to the effect that Touzi No. 512 was formed out of the lands of Touzi No. 523 was made by the Dudhurias for the first time on the 5th May, 1904, in their application (Ex. 11) made to the Collector for the purpose of being excused from filing a separate road cess return for Touzi No. 512. In the Cess return, however, [Ex. 10(a) C. 730] filed by them on the 6th September, 1904 no such statement was made. The appellant Company purchased the *patni* from Crawford, along with other properties from others by a conveyance dated the 3rd December, 1906. At that

time the other road cess return Ex. 10 (B 428) which contained a statement similar to the statement made in Ex. 11 (G. 1) had not been filed. Sivadáss Dutta (A75) has deposed that he was an officer of Messrs Andrew Yule & Co. who were the managing agents of Robert Watson & Co. Ltd. and also became the managing agents of the appellant company. He says that just before the purchase of the appellant company he called from the Muffasil road cess returns filed by the Dhudhurias. This story is improbable because those returns would not be necessary either for the investigation of title or for preparing the conveyance. Even if the story be true the relevant road cess return then available would be Ex. 10 (a). By that return no representation would be conveyed to the appellant that the lands of Touzi No. 512 were re-formations *in situ* of Touzi No. 523, because no such statement was made in Ex. 10 (a). There is also no evidence that the appellant company completed its purchase on the faith of anything contained in the road cess return, Ex. 10 (a). The said witness does not say anything with regard to Ex. 11. That the existence of Ex. 11 was unknown to the appellant company at or before its purchase, and so it had not acted upon any representation made therein, is quite apparent from the manner in which Ex. 11 was exhibited in the case. The document was not in the appellant's list of documents. It was not called by the appellant from the Collector. Some other papers were called from the latter by the appellant and in the bundle sent was found the application and it was at once proved. (Judgment of the Subordinate Judge—A. 138 ll. 10 to 20). We accordingly hold that no case of estoppel has been made out by the appellant.

The defendants admit that Touzi No. 512 was created for lands which had accreted to Touzi No. 523 (paragraph 9 of the written statement). They do not plead, as has been supposed by the learned Subordinate Judge, that those lands first formed as an island *chur* with unfordable channels all round. Under section 4 of the Regulation XI of 1825 those lands became an increment to the *patni* tenure of Messrs. Robert Watson & Co., the *patnidars* at the time, and if the right of Messrs. Robert Watson & Co. had been ultimately conveyed to the appellant the latter would have the right to possess those lands and the zemindárs, the contesting defendants, would have no right to possess in Khas. The right so given by law to Messrs. Robert Watson & Co., is sought to be defeated on the pleas taken in paragraph 10 of the original written statement as amended

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and in paragraph 1 of the spplementary written statement. The pleas are—

(a) that the Messrs. Robert Watson & Co., relinquished the right given to them by Regulation XI of 1825.

(b) that they forfeited those rights by denying the legality of the settlement of Touzi No. 512.

(c) that their rights under the Regulation had been extinguished as the zemindars were in khas possession for more than 12 years during which the lands remained above water after formation in 1867-68.

In our judgment none of the pleas have been made out by the defendants. In an earlier part of our judgment we have considered the question of possession in detail and have found that Messrs. Robert Watson & Co. and their successors-in-interest were all along in possession in assertion of their *patni* right. The absence of an offer by them to pay additional rent for the increment to their tenure cannot in our judgment, take away the right conferred on them by section 4 of Regulation XI of 1825. There can be no question of forfeiture as Messrs. Robert Watson Co. never denied the legality of the creation of Touzi No. 512 on the basis that the lands thereof were accretions. All the evidence that is on the record show that they and their successors instead of relinquishing or abandoning their right were asserting and maintaining the same.

The second line of defence is that even if Messrs. Robert Watson & Co. and Messrs. Robert Watson & Co. Ltd. had *patni* right over the lands of Touzi No. 512, the same was not conveyed either to Crawford or the appellant. The contention depends upon the construction of the conveyances [Ex. 27 (a) (B379) and Ex. 27 (b) (B408)]. In the recitals of the former conveyance the vendors Messrs. Robert Watson & Co. Ltd. declared their intention to convey to the purchaser Crawford the Rajapore concern together with all zemindaries, *patnis* etc. belonging to the said concern. The vendors actually conveyed to the purchaser all their interest in the "said Rajapore concern" and in the zemindaries and all other landed immoveable property held therewith or belonging thereto "all which premises are more particularly described in the schedule annexed .... and all other kinds of Jotes .... and all other land and tenure of every description held or belonging to the said concern". In the schedule the *patni mahal* is described as "Taraf Udaynagore appertaining to the Murshidabad Collectorate Touzi No. 523".

The respondents' Advocate bases his argument on the description given in the schedule. and says that the *patni* in Touzi No. 512 did not pass to the purchaser. The conveyance however expressly conveys to the purchaser not only what was described in the schedule but all the landed property, *zemandaries*, *patnis* and other tenures which were being then held as belonging to the Rajapore concern. The *patni* over the lands of Touzi No. 512 was then undoubtedly held as appertaining to the said concern. This is indicated by the statement made in the schedule to the conveyance executed by Messrs. Robert Watson & Company in favour of Messrs. Robert Watson & Company Limited (Ex. 27, B. 272 at page 281). The conveyance Ex. 27(b), B. 408 in favour of the appellant substantially takes the same form as the conveyance Ex. 27(a). Several indigo concerns including the Rajapore concern were conveyed to the purchaser "together with all other property whatsoever and which the vendors or any of them were entitled in connection with the said concerns" (B. 411, paragraph 4). The fifth schedule annexed to the conveyance puts the matter beyond doubt. Whatever was conveyed to Crawford by Ex. 27(a) was being conveyed to the appellant. We accordingly overrule this defence also.

The appellant company is accordingly entitled to recover possession of the lands in suit on the basis, and on that basis only, that the lands in suit are accretions to its *patni* in Taraf Udaynagore.

The next question is whether the appellant is entitled to mesne profits. In the plaint the appellant claimed mesne profits from the 12th September, 1927 till redelivery of possession. No court-fee was however paid on the claim for mesne profits but a statement was made that court-fee on that relief would be paid when ordered by the Court. The plaint ought to have given a tentative valuation for the claim for mesne profits and on that valuation court-fees ought to have been paid. But as the plaint stood the Court could not have dismissed the prayer for mesne profits without giving an opportunity to the plaintiff to value the relief and to pay court-fee thereon. Even if the suit was confined to a claim for mesne profits only the plaint could not have been rejected without the plaintiff being given an opportunity to put the matter right [Order 7, rule 11(c)]. The appellant has made an application before us for valuing the claim for mesne profits separately and has tendered the deficit court-fee. The first technical difficulty in the appellant's way has been now removed by our granting that portion of the prayer made in that application. The reason which led us to grant the

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prayer was that such an amendment ought to be allowed at any stage of the suit.

The second objection of the respondents is that the prayer for the mesne profits had been withdrawn by the plaintiff company in the lower Court by its application, dated the 18th May, 1933. On that day it applied for permission to withdraw the prayer for mesne profits with leave reserved to bring a new suit for the same. The withdrawal of the prayer required an order from the Court as leave to bring a suit was prayed for. The Court did not pass any order on that date but stated in the order sheet that the petition for withdrawal be kept with the record for orders at the time of the judgment (order No. 112, A. 26). No doubt no order was ultimately necessary on the petition in view of the fact that the suit was entirely dismissed. On our reversal of the decree of the lower Court for possession it would have became necessary for us to pass an order on that petition, but before we could do so, when the matter was pending judgment the appellant company filed an application before us for allowing it to withdraw the application made by it in the lower Court on the 18th May, 1933 and we granted that application. We do not take away the right of a party to withdraw any application made by him on which no orders had been made at the time. The prayer for mesne profits accordingly stands and the technical defect has now been removed.

On the 18th May, 1933 the lower Court, however, reframed the issues and the issues on mesne profits previously framed was left out. In our judgment that issue ought to be now framed and decided. We accordingly direct the lower Court to start an enquiry for mesne profits but in the course of that enquiry the Court must also consider the question as to whether the contesting defendants ought to be made liable at all for mesne profits. That question was sought to be argued before us by the respondents' Advocate, but we intimated that we should have the views of the lower Court on the matter.

As an enquiry for mesne profits will have to be started and as proceedings for granting mesne profits are entirely distinct proceedings we thought that was an additional reason why the views of the lower Court on that point ought to be ascertained.

We accordingly set aside the judgment and decree of the lower Court and decree possession to the appellant. The Court below is directed to take proceedings for determining whether the defendants are liable for mesne profits, and if it answers that question in

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the plaintiff's favour, then to start an enquiry for ascertaining the amount. • .

The question of costs will now have to be determined. More than three-fourths of the time that the hearing lasted had been taken by the appellants' Advocate in arguing the question of re-formation *in situ* and of estoppel on which he has lost. We think that in these circumstances although the appeal has succeeded, each party ought to bear the costs incurred by it or them at the hearing, that is no hearing fee ought to be allowed to any. The appellant must have the costs of the court fee stamps affixed on the memorandum of appeal and the fee payable for drawing the memorandum of appeal. As regards the paper book we are of opinion that it has been unnecessarily increased in volume. Only three maps Nos. 46, 50 and 52 out of Part II, Volume II of the map volumes were referred to at the time of the argument and nearly half the number of maps of Part II, Volume I was not opened. Only a few settlement records were necessary and were referred to at the time of the hearing but three volumes D, E and F have been padded with them. Only the last few pages of volume F beginning with 2006 were necessary. In these circumstances and having regard to the failure of the appellant company on the point of re-formation *in situ* we think that it ought to have no costs for printing the maps, except of Colebrooke's map (Map No. 4), Thakbust of Udaynagore (Map No. 15), Revenue Survey Map of Goas (Map. No. 22), R. C. Sen's map (Map No. 28), Smart's map (Map No. 46) Rennel's map (Map No. 50) and O'Donel's Map ; and only one-fourth of the other printing costs. It would also have the costs of the lower Court from the contesting defendants.

A. T. M. *Appeal allowed : Case remanded.*

CRIMINAL REVISION.

Before Mr. Justice G. D. McNair and Mr. Justice N. A. Khundkar.

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July, 25

MONI LAL MITTER

v.

THE EMPEROR.*

Criminal trial—Charge to be proved beyond reasonable doubt—Indian Penal Code (Act XLV of 1860), Sections 193 and 471—Failure to establish that the document is a forged one—Acquittal of accused.

In a criminal trial it is essential that the charge should be proved without any reasonable doubt.

Where the accused is charged under section 471 and 193 of the Indian Penal Code, the failure to establish that the document in question is a forged document would result in the acquittal of the accused.

Application fof Revision under section 435 of the Code of Criminal Procedure.

The material facts will appear from the judgment.

Messrs. Hiralal Ganguly and *Sudhir Chander Choudhury* for the Petitioner.

Messrs. Troilakshya Nath Ghose, Krishna Kishore Basak and *Biswa Nath Roy* for the Complainant.

The judgments of the Court were as follows :

July, 25.

Mc Nair, J. :—This Rule was issued calling upon the Chief Presidency Magistrate of Calcutta to show cause why the conviction and sentence passed upon the petitioner should not be set aside. The accused was charged on two counts—(1) under section 471 of the Indian Penal Code for having in the course of judicial proceedings, dishonestly used as genuine a letter, dated the 20th May, 1925, purporting to be typed under the authority of and signed by Ramesh Chandra Mitter, who neither authorised nor signed it whereby he committed an offence punishable under section 471 of the Indian Penal Code, and (2) under section 193 of the Indian Penal Code for having intentionally fabricated false evidence by making a document, namely, the said letter, purporting to be an acknowledgement by Ramesh Chandra Mitter of money and jewellery given by the accused on the 1?th March, 1924, which document was fabricated for the purpose of being used in judicial proceedings.

*Criminal Revision Case No. 530 of 1939, against the order of Mr. S. Wajid Ali, Third Presidency Magistrate, Calcutta, dated 31st March, 1939.

This case is the outcome of previous proceedings instituted by the accused against Ramesh Chandra Mitter for criminal breach of trust. His story was that in March 1924 he had entrusted cash and jewellery of the value of about Rs. 5000 to Mr. Ramesh Chandra Mitter, who is an attorney of this Court, and obtained a receipt. That receipt he lost and the letter of the 20th May, 1925, the subject-matter of the present charge, was said to have been written by Mr. Ramesh Chandra Mitter in reply to the request of the accused for a duplicate receipt. Subsequently the accused demanded the return of his money and ornaments and on Mr. Ramesh Chandra Mitter's denying all knowledge of the transaction, he instituted the criminal proceedings. The matter was sent to Mr. S. C. Palit for an enquiry and if possible for a settlement. At the enquiry the accused produced the letter—Ex. III and the receipt, which is Ex. IV, in support of his charge. The letter is in the following terms :—

"To Babu Moni Lal Mitter,

Dandapanitala, Nabadwip, at Nadia.

Dear Sir,

The receipt of your money and jewelleries was given on 11th March, 1924, but you have stated that you have lost the same.

However, what urges you to call for the receipt now? On returning to Calcutta at your convenient time you should see at my house. Money and jewelleries what you need, you may take from me. Moreover, do not forget to bring the key of the ornament-box which is with you.

Yours faithfully,
R. C. Mitter."

This letter is dated the 20th May, 1925. The address is 4 Hastings Street, which was the office of Mr. Mitter, and it is typed on Mr. Mitter's office paper. The receipt, Ext. IV, is a receipt for a sum of Rs. 1000 paid through Mr. R. C. Mitter to two ladies and the present accused alleged that Rs. 1000 was paid out of the funds deposited by him with Mr. R. C. Mitter. The genuineness of this document was at first called in question but was eventually admitted. Mr. Palit reported the result of his enquiry and the charge against Mr. R. C. Mitter was dismissed. Mr. R. C. Mitter then initiated the present proceedings against the accused.

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McNair, J.

It is noteworthy that during the proceedings before Mr. Palit, Mr. R. C. Mitter was called upon to produce the press-copy letter books which were material to the issue. He failed to do so on the ground that they could not be found. It was suggested, but it could be nothing more than a suggestion, that the accused had done away with these press-copy letter books merely on the ground that he had access to Mr. Mitter's office.

The learned Magistrate found the accused guilty under section 471 and section 193 of the Indian Penal Code. "The accused", he says "is an old man and seems to be ill. In consideration of these facts I sentence him to imprisonment until the rising of the Court and a fine of Rs. 150 or in default three months' simple imprisonment." The learned Magistrate first dealt with the question whether there was any entrustment of the Rs. 5000 and ornaments with Mr. R. C. Mitter. That was the subject-matter of the previous criminal proceedings. He found that as regards the alleged entrustment, there was no evidence whatever apart from the document Ext. III and he came to the conclusion that the story of the alleged entrustment was a myth, and the story that Rs. 1000 was paid out of the funds which were alleged to be eutrusted was also a myth. He then deals with the question of the genuineness of Ext. III. He concludes from various circumstances that Ext. III is a forgery. He says that the language of the letter is obviously not of a solicitor or of any lawyer. That is a matter of opinion. In my opinion it is not uncommon to find letters of this nature coming from a lawyer's office. He also notes the fact that the letter is not entered in the peon book. But he fails to lay sufficient stress on the fact that the press-copy letter books had not been produced and his assumption that their disappearance was due to the access which the accused had to Mr. Mitter's office does not appear to me to be warranted. The one essential subject-matter of proof in the charge is whether the letter is or is not forged and on this nobody could give better evidence than Mr. R. C. Mitter himself and Mr. R. C. Mitter after having looked at his signature has said—"The signature seems to be mine. I cannot say without looking at the content." This document had been produced in the previous cirminal proceedings and was again produced in the present proceedings and it is impossible to find that Mr. R. C. Mitter did not know what the content of this letter was when it was the very subject-matter of the charge, which he was bringing against the accused. In view of the fact that he is unable to deny his signature to this

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COMPARATIVE CRIMINAL JURISPRUDENCE AND THE NECESSITY OF ITS STUDY IN INDIA.

BY

[MR. W. B. MAZOOMDER, B.C.S. (JUDL.),

Munsif, Barisal.]

The study of the science of comparative Criminal Jurisprudence has made considerable progress in the western countries. In France there is a special department attached to the Ministry of Justice where the translations of the foreign laws and codes are made. It is needless to mention that at the present time a knowledge of the law of other civilised countries is absolutely necessary for the lawyers, jurists and legislators. It is desirable that our statesmen and legislators should have an acquaintance with the criminal laws of other countries. The study of the comparative Criminal Jurisprudence is helpful alike to the historians, philosophers and moralists who can understand from its study the character, idiosyncracies of various nations of the world. It is also invaluable to judges and lawyers for it helps them to measure criminality, weigh degrees of culpability and decide on the nature and the amount of punishment to be inflicted upon the criminals.

A knowledge of the comparative criminal law is undoubtedly important to the persons entrusted with the duty of legislation. It is desirable that criminal law should be a code based on perfect reasons and wisdom and the guilty persons should not escape the penalty of law owing to some technical flaws and processual defects. The criminal law should be so codified as to be easily accessible and readily understandable to the people. The French Penal Code of 1810 which served for half a century as a model to the legislators of Europe has lost its ground and has been superseded by the German Code of 1870. Even the German treatise hardly be regarded as a model, so severely has it been criticised in the meantime. Besides we have the Indian Code, the Hungarian Code and

the Dutch Code. In England we have no codified criminal law. In 1880 an attempt was made to have a full criminal code for England, but it has not as yet produced any, though there are isolated acts creating new offences.

A comparative study of the criminal law of different countries is sure to bring to light many important and interesting points in the domain of criminal law. As it is desirable that the criminal law of every country should be free (?) from all barbarities, anomalies, defects and omissions, so a comparative study of this branch of law would be very helpful. A few instances will make the point clear. For example:—A man feeling thirsty is drinking water from a tank the water of which is poisonous. Another man who knew the water of the tank to be poisonous saw the first man drinking the same water but did not warn him at all. The man afterwards died. Is the man who omits to warn him guilty of homicide by simple omission? Under the law of India he is not guilty. It is so also in England. But it is desirable that such an omission should be punished. If we look to the Dutch Penal Code we find the provision of punishment for such omission. The article runs thus "He who seeing another person suddenly threatened with the danger of death, omits to give or furnish him with assistance which he can give or procure without any reasonable fear of danger for himself or other is punished, if the death of person in distress has resulted, with three months' imprisonment and fine." The Louisiana Penal Code also says that homicide by omission only is committed by voluntarily permitting another to do an act that must in the natural course of things cause his death without apprizing him of his danger if the act be involuntary or endeavouring to prevent it, if it be voluntary. Suppose a man suffering from an incurable disease knowing that he cannot recover asks his servant to give him some sweet, soft and painless poison in his food and drink. Is the servant who complies with such request to be guilty of murder? The Hungarian Code gives him three years reclusion. In the Code of Holland the maximum punishment is twelve years but in India he will be considered as being in the category of murderer. In the case of defamations the Penal Code of India gives the right of prosecution to near relatives. The Hungarian Penal Code restricts this right to the father, mother, brothers, sister, husband, wife and children of the deceased person. In Holland this right is extended to the relatives in the direct or the collateral line up to the tenth degree. In England and in India a sister will be criminally prosecuted if she harbours a criminal brother. The husband and the wife are excepted

from the operation of the law. In France, Belgium and Louisiana brothers, sisters and other relatives are also excepted.

In India under section 75 of the Indian Penal Code a guilty man will receive enhanced punishment if he is proved that he has previous convictions. He will be considered a recidivist, no matter whether some ten or twelve years have elapsed since his release from prison. The Indian Penal Law does not point out any limitation. In France and Belgium a convict will not be considered a recidivist if more than three years have elapsed since his release from prison. In Holland a lapse of five years and in Denmark and Hungary ten years' lapse will save him from receiving enhanced punishment. In England a man will be guilty of false evidence if he speaks something false to the material issue of a case. But in India no matter whether the false evidence is material or immaterial, he will be awarded punishment. In England adultery is not a criminal offence. Some years back a Judge of the highest appellate courts in one of the Provinces of British India remarked while reducing the sentence of the lower Court that prosecutions on the charge of adultery are to be deprecated as it does not constitute a criminal offence in other civilised parts of the world.

Thus a comparative study of criminal law will enlighten the jurists, statesmen and lawyers on many points of criminal law and will point out what defects anomalies and absurdities of the criminal law of his country are in comparison with the penal law of other countries.

The study of the criminal processual law of different countries will similarly enable us to know how the criminals are tried and punished. It is to be found everywhere that precautions have been taken so that the criminals may not escape punishment due to flaws and technicalities in the law of procedure. The Criminal Procedure Code of India points out the same thing. Section 537 of this warns "that no finding, sentence, or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account of (a) any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation order, judgment, or other proceedings before or during trial or in any inquiry or other proceedings under this Code or (b) of the omission to revise any list of jurors or assessors in accordance with section 234 or (c) of any misdirection in any charge to a jury unless such error, omission, irregularity or misdirection has in fact occasioned a failure of justice. In the explanation attached to this section it is mentioned—In determining whether any error, omission or

irregularity in any proceeding has occasioned a failure of justice the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceeding. So here we find a provision framing the Criminal Procedure Code with express purpose of eliminating all possibilities of acquittal except on the merits of the case. The New York Code of Criminal Procedure as well as the Louisiana Penal Code are framed with the same motive. The article of the Louisiana Penal Code takes away from the guilty all hopes of escape by a resort to formal or technical objections. It states thus—" The great object of the penal law being the prevention of offences by the example of punishment, the interest of all codes of procedure is to ensure this end ; therefore every system must be imperfect which permits the form to defeat the substance of the law and suffers a Criminal ever to escape punishment from any defect of form in the prosecution." The law of criminal procedure of every country is more or less influenced by the constitutional law of the country. In England the criminal law suffered from the same reason. Both under the Tudors and the Stuarts the acquittal of the offenders in the case of press and political offences in particular was desired by the community at large. The result was that the accused persons were shown indulgence and trials were not strictly legal. In England the penal law is to a great extent based on the political, moral and religious opinions of the people. But in France the criminal law emanates purely from the Governmental authority. In France there is properly no law of evidence in criminal cases which are decided in accordance with moral conviction. In the Prussian Code it is the same. Thus the mere violation of criminal law is punishable and no criminal intention is necessary. Legislators may get many useful hints from the study of the Criminal Procedure Code of other nations. In Italy doctors, surgeons and other health officers are under a legal obligation to inform the police of all classes of bodily injuries and private doctors and other experts are bound to assign the police at investigation. In German Criminal Procedure Code some high officials, viz., the Chancellor of the Empire, the Ministers, Senate' Members, the heads of Superior Departments are exempted from personal appearance in Courts. In India such exemptions are not found. It is desirable that some such exemptions should be introduced in this country and the superior officers of the Government should not be compelled to go to the witness box.

In the domain of criminal law limitations have been introduced

in many countries. The maxim *nullum tempus regi* is now growing obsolete. It is desirable that some limitations should be imposed on the prosecution of offences in this country according to the nature of the offence s.

In Italy no civil action will lie upon the same acts as have been decided by the Criminal Court as not constituting any offence or that the accused did not commit it. In France the law is as follows—"The acquittal pronounced in a Cirminal Court is only an obstacle to a civil action if the criminal judge has clearly negatived the fact which is the common basis of the action and the civil claim is absolutely irreconcilable with the findings and decision of the criminal judge. In India a man losing his case in the Criminal Court may easily go to start a suit on the same facts in another Civil Court. This he may do though he might have been ordered to give compensation to the accused for bringing a vexatious case against the accused. There is no legal bar to these.

In France, Italy and Germany the accused must have a defender. In Scotland every prisoner is entitled by statute of 1587 to have a lawyer to defend him. In Germany and Italy advocates refusing to defend an accused are taken to task as being guilty of unprofessional conduct unless there are good reasons.

In America the accused is a competent witness on his behalf and he can be cross-examined. In France the examination of the accused is the most important matter. In Austria the accused is invited to answer clearly and truthfully, and he is told that a lie in the presence of the evidence will not avail. In England the accused under some acts are competent witnesses. In India there is only the examination of the accused to enable him to explain the facts going against him.

In India there is the enlarged right of appeal in criminal cases. Revision after appeal is here carried to an excess. In Italy, France, Germany there are distinct limitations on revision.

The study of the foreign codes is very useful in our countries where there is no common law of the land and where every thing is governed by the acts of the legislature. A knowledge of the foreign law will immensely help the legislators to frame laws in keeping with the same of the other civilised countries of the world. I have given above some points as a result of the comparative study of the penal laws of the different countries of Europe. The study of the law from the comparative standpoint should be encouraged in our country. Though the intention of the local

legislature is not to be ignored and the climate, situation, customs and social, political, economical and religious views of the people of the country are to be carefully considered before the passing of an act by the Legislature ; yet a knowledge of the foreign laws will certainly prove a very helpful guide and strong aid to statesmen, jurists, legislators and lawyers. In these days of international connection and co-operation the study of comparative legal jurisprudence is urgently necessary otherwise evils of alarming magnitude will arise from narrowness and stagnation. The study of the foreign laws should be encouraged in our Universities and select topics from foreign law codes should be introduced in the syllabuses of the law examination of our Universities and translations of foreign laws and codes should be undertaken by the experts in our country.

NOTES OF CASES.

In re Muthuswami Chettiar (petitioner).

1939.

I. L. R. [1940] Mad. 335 F. B.

Code of Criminal Procedure (Act V of 1898), sections 107, 112.

The petitioner was served with a notice under section 112 of the Criminal Procedure Code alleging that he as leader of a rival party was giving active support to his followers who have already committed breach of peace and are likely to do so again. He was asked to show cause under section 107 and was bound down. In revision it was referred to Full Bench :

Held [per *Leach, C. J.*, *Krishnaswami Ayyangar* and *Patanjali Sastri, JJ.*]—that though the notice did not disclose that the petitioner *contemplated to commit breach of peace at that time* yet it gave the substance of information and that it was a proper and valid notice.

S. C.

Paladugu Veera Ramchandra Rao *v.* Paladugu Parasuramayya.

1939.

I. L. R. [1940] Mad 349 F. B

Code of Civil Procedure (Act V of 1908), section 48—Execution started twelve years beyond date of decree but in time from its amendment, barred—Indian Limitation Act (IX of 1908), article 182.

The execution by Parasuramayya on 12th November, 1935 of his decree, dated 9th March, 1922 amended on 16th July, 1928, against Ramachandra was dismissed by trial Court as time-barred but decreed in part in appeal. On second appeal, it was referred to Full Bench:

Held [per *Leach, C. J.*, *Krishnaswami Ayyangar* and *Somayya, JJ.*]—that section 48 of the Civil Procedure Code is not governed by article 182 of the Limitation Act and that the execution is time-barred.

S. C.

Karinagisetti Chennappa *v.* Karinagisetti Onkarappa.

1939.

I. L. R. [1940] Mad. 358 F. B.

Indian Limitation Act (IX of 1908), section 21 (1)—Hindu Law—Paternal grand-mother not a "guardian".

Neelamma the paternal grand-mother and the only living relation of Onkarappa, a Hindu minor, made endorsements of payments, on minor's behalf, on the back of an insufficiently stamped promissory note executed by the minor's father since deceased, in favour of one Chennappa who brought a suit in time from the last endorsement but it was dismissed by the lower Courts. On second appeal it was referred to Full Bench:

Held [per *Leach C. J.*, *Mockett* and *Krishnaswami Ayyangar JJ.*]—that the paternal grand-mother of the minor even if she be his nearest living relation is not his lawful "guardian" and that the suit was time-barred.

S. C.

Ramasubramanya Pattar *v.* Karimbil Pati.

1939.

I. L. R. [1940] Mad. 372. F. B.

Code of Civil Procedure (Act V of 1908) Order 20 rule 12, clause 3 (added by Madras High Court), "application" not governed by article 181 Sch. I of Indian Limitation Act (IX of 1908).

Karimbil Pati's suit for possession and for mesne profits against Ramasubramanya was dismissed by trial Court but decreed in part by the appellate Court which directed on 6th November, 1930, the lower Court to ascertain past and future mesne profits. As required under sub-rule 3 added by Madras High Court to Order 20 rule 12 of the Civil Procedure Code Karimbil filed on 30th March, 1934, an "application" for ascertaining mesne profits to the trial Court which passed the decree for the amount of mesne profits after enquiry and it was upheld in appeal. On second appeal:

Held [per *Leach C. J., Krishnaswami Ayyangar* and *Somayya JJ.*]—that the "application" in Sub-rule 3 was not an application under article 181 Schedule I of Limitation Act and hence the "application" was not time-barred.

S. C.

1939
I. L. R. [1940] Mad. 382.

Nunna Gopalan *v.* Vuppuluri Lakshminarasamma.

Negotiable Instruments Act (XXVI of 1881), sections 9, 22, 60, 118.

A pronote fully paid up before demand was not returned but indorsed to one Gopalan whose suit thereon was decreed against both the holder and the executant by the trial Court but against the holder only, in appeal. The second appeal was held incompetent and was treated as a petition for revision :

Held [per *Leach C. J.* and *Krishnaswami Ayyangar JJ.*]—that the executant was also liable because the pronote was still current and did not attain maturity as no demand for payment was made.

S. C.

Duvvada Nandesam Chowdari *v.* Duvvada Balakrishnamma Chowdari.

1939
I. L. R. [1940] Mad. 306.

Code of Civil Procedure (Act V of 1908) section 2 (d)—What is a decree.

After preliminary decree in a partition suit by Balakrishnamma, the defendant Nandesam put in a petition and prayed that certain allotments be made to certain defendants which was rejected. On appeal :

Held [per *Mockett* and *Krishnaswami Ayyangar JJ.*]—that though more than one preliminary decrees may be passed the order under appeal is not a decree as it dealt with a matter not in controversy in the suit.

S. C.

CRIMINAL.

1939.

Moni Lal Mitter
v.
The Emperor.

McNair, J.

letter, it appears to me impossible to say that this charge has been proved. This is a criminal trial and it is essential that it should be proved without any reasonable doubt. The failure to establish that this document is a forged document must be that the accused must be acquitted.

The result is that this Rule is made absolute, the conviction of the petitioner and the sentence passed upon him are set aside and the fine, if paid, must be restored.

If the accused is in prison for non-payment of the fine, he will be immediately released.

The Rule for enhancement of sentence is discharged.

Khundkar, J. :—I agree.

P. R. *Rule made absolute.*

APPELLATE CIVIL.

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November, 22, 23.

Before Mr. Justice R. C. Mitter and Mr. Justice R. F. Lodge.

RAJENDRA KISHORE BASU ROY AND OTHERS

v.

KUMAR PROMOTHA NATH ROY AND OTHERS.*

Decree, execution of—Decree, ambiguous—Judgment, if can be looked at—Appellate Court, if can order amendment of decree.

*Appeals from Appellate Orders Nos. 203 of 1938 and 5 of 1939, against the orders of M. Haldar, Esq., Additional District Judge, 2nd Court, of Dacca, dated the 23rd August, 1938, modifying those of U. N. Chatterjee Esq., Subordinate Judge, 1st Court, Dacca, dated the 16th May, 1938.

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Where the words used in the decree are ambiguous, the execution Court can look to the terms of the judgment.

An appellate Court can *suo motu* order amendment of decree so as to bring it in conformity with the judgment, when the rights of third parties are not interfered with.

Appeals by the Decree-holders and Judgment-debtors.

Application for execution of decree.

The material facts are stated in the judgment.

Dr. Sarat Chandra Basak, Messrs. H. K. Das, Radhika Ranjan Guha, Satyendra Kishore Ghose and *Ramendra Chandra Roy* for the Appellants, in No. 203 & for the Respondents in No. 5.

Messrs. A. C. Gupta and *Priya Nath Dutt* for the Appellants in No. 5 & for the Respondents in No. 203.

C. A. V.

The following judgment was delivered :

November, 24.

Appeal No. 203 has been preferred by the decree-holders and No. 5 by the judgment-debtors. They relate to the execution of a decree passed in Suit No. 85 of 1911 which was subsequently numbered as 40 of 1912. The question involved in these appeals relates to the extent of land to which the decree-holders are entitled to get joint possession.

There were many proceedings between the parties since the decree had been passed ; some of these have bearing on the contentions raised before us by the learned Advocates of the parties. It is, therefore, necessary to recite some facts.

The Bahar zemindars are many in number. In 1911 they instituted five suits in respect of the self-same land. All the Bahar zemindars were not plaintiffs in the same suit, but some of them were plaintiffs and the rest proforma defendants. The principal defendants were many in number. We are concerned in this appeal only with defendants Nos. 112 to 114 and with the decree passed in Suit No. 40 of 1912. For brevity's sake the said defendants are called Raja brothers in these appeals. The other suits filed by the other Bahar Zemindars in 1911 were Nos. 198, 199, 91 and 90 of 1911 which were subsequently numbered as Nos. 9, 52, 42 and 45 respectively. Some time after the institution of these 5 suits which were tried analogously, a commissioner was appointed for local investigation. At the time of the local investigation the plaintiffs in these suits pointed out to him the disputed land. The commissioner in his map has shown the disputed land as shown to him as bounded by the yellow lines. A good portion of the

land so pointed out to the commissioner, was outside the plaint as originally filed. A portion of it which was not in the original plaint, was found in the possession of the Raja brothers who were not parties defendants to the suit as originally filed. They were later on added as parties defendants, being defendants Nos. 112 to 114, and by two petitions filed in Court by the plaintiffs dated the 13th September and 9th December, 1915, this additional land which was shown to the commissioner at the time of the local investigation, as being part of the disputed land, was asked to be included in the plaint. The amendments were allowed on the 17th December, 1915, and on the 23rd December, 1915, the Court of first instance pronounced its judgment.

At the time of the local investigation, the commissioner was asked to rely on the case map plot No. 1 (প্রথম খণ্ড) of a map which has been marked Exhibit 101. He has indicated the first plot of the said map by red lines. He has also indicated certain Mouzas in plot No. 1 of the said map Exhibit 191 with the dotted lines. This map Exhibit 101 in which two plots are indicated as প্রথম খণ্ড and দ্বিতীয় খণ্ড, is a part of Exhibit 108, a compromise decree passed in the year 1892 in a suit between the predecessors-in-interest of the plaintiffs in the said five suits, and the predecessors-in-interest of the Raja brothers who were added as defendants, not only in suit No. 40 but also in the remaining four suits.

From the judgment of the first Court it appears that the plaintiffs based their claim to the portion of the disputed land which is the subject-matter of the appeals which we have to deal with, on the title given to them by the compromise decree of 1892, namely, Exhibit 108 of which the map Exhibit 101 is a part. The judgment of the first Court in favour of the plaintiffs proceeds upon Exhibit 108, so far as this part of the case is concerned. By Exhibit 108 the plaintiffs' predecessors were not given title to the whole of the প্রথম খণ্ড of the map Exhibit 101, but only to portions thereof. Plot No. 1 of the said map Exhibit 101 covers the following Mouzas, namely, Naogaon, Karpara, Birlapur, Hatarbhog and Dattagaon. The plaintiffs' predecessors were given title to the whole of Hatarbhog and Dattagaon, and a portion, nearly one-half of Karpara and Birlapur which are within the red line indicated in the said map; and the predecessors of the Raja brothers sixteen-anna of Naogaon and the rest of Karpara and Birlapur outside the said line. In the decree, however, which was drawn by the Court of first instance the plaintiffs of Suit No. 40

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were given possession of "the lands to the south of plot No. 4 of suit No. 9 of 1912, that is, to the south of the attached Char lands within plot No. 2 according to the amended plaint of the suit which fall within the ambit of the map Exhibit 101." Similar decrees were passed in favour of the plaintiffs of the remaining four suits which we have mentioned above. As three of the other suits were valued at over Rs. 5000, the Raja brothers preferred three First Appeals to this Court, namely No. 282 of 1916, No. 5 of 1917 and No. 23 of 1917. As Suit No. 40 of 1912 was valued at less than Rs. 5000, an appeal was preferred by the Raja brothers against the decree of the trial Court to the District Judge. The learned Judge allowed the said appeal and dismissed that suit. Two Second Appeals were preferred to this Court against the decree of the learned District Judge. We are concerned with the Second Appeal No. 164 of 1919, which was an appeal preferred to this Court by the plaintiffs in the said suit.

The said second appeals and the three first appeals were heard analogously by a Division Bench of this Court and the judgment was pronounced on the 1st September, 1920. The effect of the judgment, in so far as it is material for our present purposes, is that the Raja brothers were given three months' time to file an additional written statement, apparently on the ground, that the Court of first instance had allowed amendment of the plaint after the hearing and shortly before the delivery of judgment. It was said that if the Raja brothers availed of the opportunity of filing an additional written statement, a supplementary decree would be passed by the Court of first instance. But if they did not, in that case the decree passed by the Court of first instance would stand. No additional written statement was filed by the Raja brothers, with the result that the decree as passed by the Court of first instance stood confirmed. That is the final decree passed in the suit between the parties.

Sometime afterwards applications for Review were filed by the Raja brothers in this Court, in the three first appeals and also in the second appeal No. 164 of 1919, and four Review Rules were issued, namely, 2F to 4F and 2(S) of 1921. The first three Rules related to the three first appeals and the last mentioned Rule to the second appeal. The three Rules 2F to 4F were heard together and were made absolute. The order passed in the Rules is dated the 11th April, 1922. The material portion of the said order is as follows:—" And further that subject to the defence we have mentioned, the plaintiffs are further entitled to all lands within their

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estate or decreed to them by the consent decree of 1892, up to the southern red line in the commissioner's map which represents the corresponding line in the map connected with the consent decree of 1892." This Court directed that the decrees in the first appeals should be prepared by including the aforesaid direction. In the Review Rule No. 2(S) of 1921, it was stated that it was not necessary to amend the judgment pronounced in the second appeal, inasmuch as in the said judgment it was stated that the judgment in the second appeal would follow the judgment passed in the first appeals, and inasmuch as the judgment of the first appeals would now embody what was stated in the order passed in the Review Rules in connection with the first appeals, the portion which was added to the judgment, as a result of the Review applications, would necessarily be incorporated in the judgment of the second appeal. In the decree, however, of the second appeal which was signed on the 3rd July, 1922 that portion of the Review order which we have quoted above, and which was incorporated in the judgment of the second appeal was not recited, but the decree drawn up by this Court simply said that if the Raja brothers did not avail of the opportunity given to them, of filing an additional written statement, the decree of the first Court as passed in Suit No. 40 would stand.

After the final judgment and the decree passed by this Court execution proceedings for enforcing the decree passed in Suit No. 10 were started. It is not necessary for us to detail the whole course of the execution proceedings ; but there are three orders, one passed by the Court of first instance and two by this Court, which are relevant. The order passed by the Court of first instance is order No. 130 dated the 24th January, 1927, and the two orders passed by this Court are dated 20th August, 1935 and 13th January, 1937 passed respectively in appeals from appellate orders No. 224 of 1935 and No. 319 of 1936. We shall have to deal with the effect of these orders later on because one part of the argument of Dr. Basak who appears for the decree-holders, is based on these three orders.

As we have stated above, the present appeals relate to the question as to what land the decree-holders are entitled to take joint possession of in execution of the decree passed in suit No. 40. We have stated before that the Map Exhibit 101 consists of two portions described as প্রথম খণ্ড and দ্বিতীয় খণ্ড. The decree-holders' contention is that they are entitled to joint possession in respect of their share, of all the lands south of plot No. 4 in suit No. 9 which are included in both the *khandas* of Map Exhibit 101. That is the

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extreme contention of the decree-holders. Alternatively they say that they were entitled to joint possession, in their share, of all the lands included in the প্রথম খণ্ড of Exhibit 101, that is to say, they are not only entitled to joint possession of all the lands of Hatarbhog and Dattagaon, but also of all the lands of Karpara, Birlapur and Naogaon.

The contentions of the judgment-debtors, the Raja brothers, are : (1) that the decree-holders cannot go beyond the southern yellow line depicted by the commissioner in the case map, and (2) that they are not entitled to all the lands up to the southern yellow line but only of such portions thereof as fall within the প্রথম খণ্ড of Map Exhibit 101, and even then they are not entitled to the whole of the said portion but only to so much as was decreed to their predecessors-in-interest in 1892 by the compromise decree, Exhibit 108 of which the map Exhibit 101 is a part. The contention therefore of the judgment-debtors in effect is that the decree-holders can only get joint possessien of so much of the lands which were decreed in favour of their predecessors in 1892 by the Exhibit 108, which fall within the yellow lines of the case map, the lands within the yellow line of the case map being the subject-matter of the dispute according to the final amendment of the plaint. The Court of first instance did not accept in full either the contention of the decree-holders or of the jungment-debtors. It held that the decree-holders could not get possession of any land to the south of the southern yellow line of the case map, but they were entitled to the whole of the lands which fall within the red line in the case map prepared by the Amin, so far as they are covered by the lands included within the yellow line. There were appeals filed both by the decree-holders and the judgment-debtors in the Court of the District Judge.

The learned District Judge held that the decree-holders' claim to possession was not limited by the southern yellow line of the case map, but they could get possession of lands which fall within the red line depicted in the case map. In this respect the learned District Judge accepted the decree-holders' contention. Against this portion of the order the judgment-debtors have preferred appeal No. 5 of 1939. The learned District Judge further held that the decree-holders were not entitled to all the lands which fell within the said red line, but only to such portions of the same which fell within the red dotted lines which had been decreed to their predecessors-in-interest by the compromise decree of 1892, that is to say, the decree-holders were entitled to get the whole of Hatarbhag and

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Dattagaon and only half of Karpara and Birlapur which fall within the red unbroken lines. . From this part of the order the decree-holders preferred appeal No. 203 of 1938.

We shall deal with both these appeals together. Dr. Basak who appears for the decree-holders says: (1) that his clients are entitled to get joint possession of all the lands which fell within the ambit of map Exhibit 101, that is to say, all the lands to the south of plot No. 4 of suit No. 9 of 1912, which are covered by both the *khandas* of map Exhibit 101 ; and (2) that, at any rate, his clients are entitled to joint possession of all the lands to the south of the said plot No. 4 which are covered by the red lines depicted in the case map by the commissioner—by the case map we mean the map prepared in the suit ; that is to say, his clients are entitled to joint possession not only of what has been given to them by the learned District Judge, but also of Mouza Naogaon and the rest of Karpara and Birlapur.

Mr. Gupta who appears for the judgment-debtors contends that in this respect the learned District Judge is right, that is to say, the decree-holders are entitled to joint possession of so much of the first plot (প্রথম খণ্ড) which had been decreed to them in 1892 by Exhibit 108. In support of his appeal he contends further that any portion covered by the red line which goes beyond and are to the south of the southern yellow line in the case map must be excluded from these proceedings, because those portions of the land were not the subject-matter of the suit.

We shall now deal with the merits of the respective contentions. Dr. Basak bases his contention on two grounds. He says, firstly, that the question cannot now be re-opened, because the matter had been settled between the parties at a previous stage of the execution proceedings by order No. 130, dated the 24th January, 1927, and the two orders passed by this Court on the 20th August, 1935 and 13th January, 1937. He further contends that at any rate that is the meaning of the decree which was passed in the suit. We shall first of all examine Dr. Basak's contentions.

It appears from the record that objections were preferred to the execution of the decree by the Raja brothers before the Subordinate Judge. Some of those objections were dealt with by the learned Subordinate Judge by order No. 130, dated the 24th January, 1927. One of those objections related to the question as to whether the decree-holders were entitled to joint possession after evicting the Raja brothers, or they were entitled to joint possession with the Raja brothers. The final decree directed eviction of the Raja

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brothers, but the contention of the Raja brothers was that by reason of subsequent events they could not be evicted from the land inasmuch as after the decree they had purchased the shares of some of the decree-holders. This question has been dealt with in order No. 130. The Court gave effect to the contention of the Raja brothers and held that inspite of the directions in the decree, the decree-holders were only entitled to joint possession with the Raja brothers, that is to say they could not get joint possession with their other co-sharers after evicting the Raja brothers. In this order there is the following passage :—" As regards the other objections I find that the decree-holders have got a decree for joint possession in the lands to the south of plot No. 4 of suit No. 9, and covered by map Exhibit 101, i.e. to the second portion of the decretal lands after evicting the judgment-debtors Nos. 112 to 114." The first portion of the decretal land was the land which had been attached by the Collector under section 146 of the Code of Criminal Procedure. In this land the Raja brothers are not at all interested, and in respect of this land the decree-holders only got a declaration of title, their claim for possession being dismissed. The learned Judge again went on to say as follows :—" But the order about evicting the said judgment-debtors is incapable of execution." After discussing the matter, he came to the conclusion that the decree-holders could only get joint possession and they could not evict the Raja brothers.

In the order passed in the Miscellaneous Appeal No. 224 of 1935, this Court directed the Subordinate Judge to appoint a commissioner to ascertain at the locality the decretal land as determined by the executing Court by order No. 130, dated the 24th January, 1927 and to deliver possession of the said land to the decree-holders in accordance with the provisions of order 21, rule 35(2) of the Code of Civil Procedure. After this order was passed by this Court, the learned Subordinate Judge before appointing a commissioner wanted to interpret order No. 130. Against the order of the learned Subordinate Judge which had been affirmed by the learned District Judge on appeal, Miscellaneous Appeal No. 319 of 1936 was filed, and there was an alternative application in revision.

After dealing with the preliminary question, as to whether an appeal lay, or not, this Court said that it could, at any rate, interfere in revision and it went on to deal with the merits of the controversy. This Court directed the learned Subordinate Judge to appoint a commissioner at once to demarcate the decretal land in the locality

without at that stage interpreting order No. 130. Then there was a direction, that if there was any dispute in course of demarcation, between the parties as regards the *extent* and position of the decretal land, the learned Subordinate Judge was to determine those questions, after the commissioner had submitted his map and report. In our judgment, the combined effect of order No. 130 and of the two orders of this Court, which we have recited above is this: that the question as to whether the decree-holders were entitled to get possession of any portion of the land which fell within the red line of the case map but was beyond the southern yellow line thereof, was final between the parties, that is to say, it is not open to the judgment-debtors now to say that the decree-holders can only get possession of such land which falls within the southern yellow line. But the question as to whether the decree-holders are entitled to the whole of the said block of land which falls within the red line, or only to a portion thereof, was left for determination by the learned Subordinate Judge after the commissioner had submitted his map and report. That, in our judgment, is the effect of the last order of this Court, dated the 13th January, 1937 passed in Miscellaneous Appeal No. 319 of 1936. That is indicated by directing the learned Subordinate Judge, not only to determine the dispute as to the position of the decretal land, but also the dispute as regards the *extent* of the disputed land. We cannot, therefore, give effect to Dr. Basak's contention that his clients are entitled to the whole of the block of land which falls within the red line, on the ground that the matter had been finally adjudicated between the parties at a previous stage of the execution proceedings. The reasons which we have given for disposing of Dr. Basak's contention also dispose of the point raised by Mr. Gupta in his Miscellaneous Appeal No. 5 of 1939.

It is, therefore, open to us to enter into the merits of the question, and for the purposes of seeing whether the contention raised by Dr. Basak is correct or not, we have to look into the decree. The decree-holders cannot claim any portion of the land which falls to the south of plot No. 4 but which falls within the দ্বিতীয় খণ্ড of Exhibit 101. At the time when the Amin went to the locality for local investigation before the trial, he was asked to plot only the প্রথম খণ্ড of Exhibit 101 in the locality which he did. The plaintiffs never attempted to have the second *khanda* of Exhibit 101 located on the case map. These facts have been pointed out by both the Courts below and they indicate clearly that the second *khanda* of Exhibit 101 was never the subject-matter of the dispute. The

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two amendment petitions of the plaintiffs filed on the 13th September, 1915, and 9th December, 1915, which had been allowed by the Court on the 17th December, 1915, indicate clearly that the plaintiffs claimed title to and possession of only that portion which they had pointed out to the Amin at the time of the local investigation, namely, the land which was enclosed by the Amin in the case map, by the yellow lines. The land so enclosed by the yellow lines covers a good portion of the first *khanda* or portion of the map Exhibit 101. It does not cover any portion of the second *khanda* of Exhibit 101 which is to the south of the first *khanda*. We cannot, therefore, give effect to the first contention of Dr. Basak, namely, that his clients are entitled to the lands to the south of plot No. 4, which are also covered by the second *khanda* of Exhibit 101.

There remains the question as to whether the decree-holders are entitled to joint possession of all the lands included in the first *khanda* of Exhibit 101 as plotted on the case map. To us it seems that the decree as drawn up by the Court of first instance and which was affirmed by this Court is ambiguous. The words, "within the ambit of the map Exhibit 101" used in the decree raise the ambiguity. It is, therefore, necessary to look to the terms of the judgment of the Court of first instance. Even if there had not been any proceeding in review in this Court, the meaning of the decree as made by the Court of first instance which was affirmed by this Court, read along with the judgment is clear. It is this: that the plaintiffs were given a decree only to such portion of the first *khanda* of Exhibit 101, in respect of which the predecessors were given a decree in 1892 by Exhibit 108, because the whole judgment on the basis of which the decree was passed proceeds on the footing, so far as this part of the case was concerned, that the plaintiffs were entitled to that portion of the land in suit because of the title acquired by their predecessors-in-interest by the compromise decree Exhibit 108. Whatever ambiguity there was in this decree (which was confirmed by this Court) has been removed by the order passed on Review by this Court on the 11th April, 1922. That order clearly states that the decree-holders would be entitled to possession up to the southern red line plotted in the commissioner's map, that is to say, in the case map prepared by the Amin at the time of the suit, which had been decreed to their predecessors-in-interest by the consent decree of 1892. Even if it was not possible to hold that the decree by itself was not ambiguous, and a reference to the judgment was

not legitimate, the order passed on Review on the 11th April, 1922, which is the final judgment between the parties, defines exactly the rights of the decree-holders; and even if the directions contained in the said judgment passed on Review, had not been embodied in the decree, there would have been no bar in bringing the decree into conformity with the final judgment, inasmuch as the rights of third parties have not been intervened. If it were necessary, we would have directed an amendment of the final decree passed by this Court so as to bring it in conformity with the judgment passed on Review. But as we have already said, that even without this amendment, the view we have taken follows from the construction of the decree taken along with the judgment.

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The result is that we dismiss both the appeals. As both sides have failed to substantiate their contentions we make no order as to costs.

A. T. M. *Appeals dismissed.*

CRIMINAL REFERENCE.

Before Mr. Justice C. Bartley and Mr. Justice T. J. Y. Roxburgh.

JOYRAM RAKSHIT

v.

ANNADA PROSAD KUNDU.*

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July, 10, 11.

Indian Penal Code (Act XLV of 1860), Section 323, conviction under, if can be altered to one under Section 325—Enhancement of sentence recommended—Accused, if entitled to show cause against his conviction—Conviction, if can be set aside on a consideration of the evidence.

The High Court has no power in a Reference under section 438 of the Code of Criminal Procedure made by the Magistrate upon a consideration of the evidence, to alter a conviction under section 323 Indian Penal Code, to one under section 325 of the Code.

*Criminal Reference No 109 of 1940, by S K. Haldar, Esq, District Magistrate, Bankura, dated the 28th May, 1940, recommending modification of the order of B. K. Ghosh, Esq, Deputy Magistrate of Bankura, dated the 13th of May, 1940.

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When the order of a trying Magistrate is recommended for revision and enhancement of sentence is also recommended, the accused is entitled to show cause against his conviction. Under such circumstances the High Court will be compelled to examine the actual evidence in the case.

If on a consideration of the entire evidence, the High Court comes to the conclusion that it does not warrant a conviction, it should be set aside.

Reference under section 438 of the Code of Criminal Procedure.

The material facts will appear from the following

Order of Reference :

A brief analysis of the case :

Accused Annada Prosad Kundu, son of Man Gobinda Kundu, is the husband of Probodhbala, deceased, the daughter of P. W. 1. Joyram Rakshit. Annada and Probodhbala used to live at Kantapahari in the house of Annada's father. Annada frequently ill-treated and used violence towards Probodhbala of which she complained to her father and other relations and neighbours. Towards the latter part of the night of 18th Ashar (3rd July) last the screams of Probodhbala were heard coming from the upper story of the room which was usually occupied by Annada and his wife. P. W. 6, Golok, a servant of the house, who was sleeping in a ground-floor room heard the screams, went up the stairs and saw the accused Annada beating Probodhbala with a stick until she fell down. P. W. 2. Ram Kumar Kundu, lives in a house just contiguous to the house in which Annada lives, the southern wall for which is a common wall of the two houses. He also heard the screams and climbing a ladder saw through a window that Annada was beating Probodhbala with a stick. He asked Annada to desist but the accused did not listen. He also saw the deceased fell down. P. W. 3, Satish Kundu, also heard the cries of the deceased and the voice of the accused threatening to make an end of her. Next morning, the dead body of Probodhbala was found by the aforesaid witnesses and other neighbours.

On 4th July, 1939, at 6-30 A. M. one Gobindalal Rakshit informed the S. I. of Chhatna P. S. (C. W. 1) that Probodhbala had committed suicide by hanging. The S. I. searched the place of occurrence in the evening and held an inquest and, sent the dead body to Bankura for post-mortem examination. The Civil Surgeon gave his opinion that the death was due to shock and haemorrhage caused by the introduction of some foreign body into the deceased's vagina, that it was probably homicidal, and that

it was not a case of suicidal hanging. On this report, the S. I. drew up a First Information Report under section 304 Indian Penal Code on 9th August 1939, but after investigation he submitted a final report. Thereafter Joyram Rakshit, P. W. 1, the father of the deceased, filed a petition of complaint to the Magistrate and after judicial enquiry the accused was summoned and tried on a charge under section 326 Indian Penal Code.

The plea of the accused was a simple plea of not guilty. But from the trend of cross-examination of the prosecution witnesses, it appears that the defence wanted to make out a case of suicidal hanging.

The trying Magistrate, Mr. B. K. Ghosh, found that the accused Annada had voluntarily caused hurt to Probodhbala but he reduced the charge under section 326 Indian Penal Code to one under section 323 Indian Penal Code and convicted him under the latter section sentencing him to pay a fine of Rs. 1, 000 or in default to undergo rigorous imprisonment for six months.

The Order recommended for revision :—

The trying Magistrate's order of conviction under section 323 Indian Penal Code should, in my opinion, be altered to one under Section 325 Indian Penal Code and the sentence which is grossly inadequate should be enhanced.

In what particular portion of that Order the Court making the reference considers an error on a point of law to exist :

and

The grounds upon which in the opinion of such Court the order of conviction should be altered and sentence enhanced.

The trying Magistrate has fully believed the eye-witnesses who saw the actual assault till the girl fell down. He states in his judgment that " it is proved beyond the least shadow of doubt that accused Annada Prosad assaulted her with a lathi most brutally till actually she rolled on the floor. " The Civil Surgeon's opinion is that the death was due to shock and haemorrhage caused by the introduction of a foreign body into the vagina of the deceased. The Magistrate definitely accepts this opinion of the Civil Surgeon in his judgment. Yet he goes on to find that it is not proved beyond doubt that it was the accused who caused the fatal injury. The person who beat Probodhbala with a stick on other parts of her body must have caused the injury to her private parts as there is not the slightest evidence that any third person caused it. The

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accused is thus clearly guilty of an offence under section 325 Indian Penal Code.

I called for the explanation of the trying Magistrate and attach it to this letter. The explanation appears to me to be utterly futile. In the first place, he says that he was uncertain whether the tear in the vagina was due to a homicidal act or to the decomposition of the body. He had, however, definitely accepted in his judgment the opinion of the Civil Surgeon that the death was due to the injury to the private parts. Secondly, he says that there is no eye-witness that it was the accused who caused the fatal injury. Such reasoning would take away the probative value of the best circumstantial evidence. The accused was seen in the act of beating his wife with a *lathi* and it is fantastic to suggest that some third person suddenly intervened and caused an injury of the most brutal description. Thirdly, he says that it is probable that the tear may have been caused by some abortionist since the police papers show that a woman was seen to leave the house early in the morning with a bundle. Probodhbala was however, a married woman and there is no reason why an abortion should be committed; moreover, there is not an iota of evidence, medical or otherwise, to prove such a story. The information that was sent to the Police was that Probodhbala had committed suicide by hanging herself and the Civil Surgeon was emphatically of opinion that death was not due to suicidal hanging.

As regards the sentence, the trying Magistrate stated in his judgment that the assault was most cold-blooded and was continued till the deceased could no longer cry and that a severe sentence was necessary. Yet he passed a sentence of fine only which would really fall on the father of the accused, who is a wealthy person. Even if the offence committed by the accused be held to be one under section 323 Indian Penal Code and not one under section 325, the maximum sentence of imprisonment prescribed in section 323 (i. e. one year's rigorous imprisonment) should have been awarded in view of the brutal nature of the crime committed on a defenceless woman.

Mr. D. N. Bhattacharjee for the Crown and in support of the Reference.

Messrs. N. K. Basu and *Ramkrishna Pal* for the accused and against the Reference.

The judgments of the Court were as follows :—

July, 11.

Bartley, J. :—This is a Reference under section 438 of the Code of Criminal Procedure, made by the District Magistrate of

Bankura. The matter arose in the following way: On the 4th July, 1939, at 6-30 in the morning one Gobinda Lal Rakshit laid an information at the Chhatra police station that Probodhbala, wife of Annada Prosad Kundu, had committed suicide by hanging herself. The Sub-Inspector went to the spot and found the body of Probodhbala lying in the upper part of the house. He held an inquest and sent the body to Bankura for *post-mortem* examination.

In the original post-mortem report it was noted that opinion regarding the cause of death was reserved pending the receipt of the results of chemical examination of the viscera of the deceased. But it was also noted in the same report that there was a tear in the pelvic cavity and that the vaginal wall was intensely congested and bruised. The body at the time of the post-mortem examination was in a more or less decomposed condition.

After receipt of the report of the Chemical Examiner, which showed that there was no poison detected the Medical Officer who made the post-mortem gave it as his opinion that the woman probably died as a result of shock and hæmorrhage resulting from the injuries to the vagina, probably homicidal. On receipt of this opinion a case was instituted at the thana on the 4th August, 1939, which ended in the submission of the final report, that is to say, that there was no evidence on which to send up anybody on a charge of causing the death of the woman.

The next step was that on the 14th of October, 1939, the father of the deceased woman lodged a complaint to the effect that his daughter's husband in collusion with some other people had murdered his daughter on the 18th of Ashar last and then given out that she had committed suicide. The Police, however, failed to send up anybody, and the complainant therefore moved the Court by way of a petition of complaint.

The matter was enquired into, and finally the accused Annada Prosad, husband of the woman, was placed on his trial on a charge under section 326 of the Indian Penal Code. The trying Magistrate convicted him under section 323 of the Code and sentenced him to pay a fine of Rs. 1000, in default six months' rigorous imprisonment. The District Magistrate then made the present Reference recommending that the charge should be altered to one under section 325 of the Indian Penal Code and that the sentence, which was grossly inadequate, should be enhanced.

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In the first place, it should be pointed out that this Court has no power to alter a conviction under section 323 to one under section 325 of the Indian Penal Code in the manner recommended by the learned District Magistrate. In the second place, as the recommendation is that the sentence should be enhanced it follows that the accused is entitled to show cause against his conviction and this has been done on his behalf in the present case. We have, therefore, been compelled to examine for ourselves the actual evidence in the case in order to decide whether the conviction was a proper one or not.

On consideration of the entire evidence we are forced to come to the conclusion that it does not warrant a conviction under section 323 of the Indian Penal Code. In the case under consideration, in which the Magistrate convicted, the prosecution attempted to establish that the woman had been killed by her husband at about 3 O'clock in the morning in an upper room in the accused's own house. In order to do so they examined two witnesses who claimed to have seen what actually happened and two other witnesses who deposed that they heard the woman crying out for help. Now, the evidence of the first of these two eye-witnesses is this: that on the night of occurrence at about 3 O'clock in the morning or one *prahar* before the day-light he was in his room next door to the house of the accused. He heard shrieks coming from a room on the upper story of the accused's house. There was a window in that room and there was a wooden ladder kept below the window. He climbed this ladder and saw through the window the accused beating his wife with a stick. He tried to dissuade the accused and told him not to beat his wife, but the accused went on beating her until the woman fell. The next morning he went to the house and found the woman dead.

With regard to this evidence it is, in the first place, highly improbable that a witness would go to the trouble of climbing a ladder, looking through the window, remonstrating with the accused and then merely go back home.

In the second place, his evidence, if accepted, does not tally with the medical evidence which suggests that the death of the woman was caused not by external beating but by internal injuries.

Lastly, this witness is admittedly on bad terms with the father of the accused.

The evidence of the other eye-witness, who was a servant in the house of the accused but was dismissed the next day, is that on that night the accused and his wife were in the upstairs room. He heard the wife screaming and went upstairs, He saw that the accused was poking her with a stick and that the accused's father was present and was inciting the son to keep on beating her. She fell down and looked unconscious. In the morning she was dead. The father and the son asked this witness to say that she died of hanging.

This, of course, is a different story to that told by the first witness. According to P. W. 6 the father and the son were present at the time when the woman was being beaten and until she fell senseless. According to the other witness only the son was there, and he was there until she fell down senseless. The only other evidence is that of some witnesses who say that they heard screams at the time of the occurrence and recognised the voice of Probodhbala. One of these witnesses accounts for his presence at that time in the morning by saying that he was coming at that time along the gully past the accused's *bari* from his field of paddy-seedlings. The other witness who heard screams from the *bari* accounts for the fact by saying that he lived about a *rashi* off and that on that night he had not a sound sleep as he had stomach trouble and that he heard the woman crying out, "Do not beat me any more. I am dying." He called for the accused's father but got no answer and went away. This witness also admits that he had a suit with the father of the accused, which went to the length of this Court.

This is all the evidence upon which the conviction of the accused has been based.

Now, it appears perfectly clear to us that in view of the highly discrepant stories told by the two alleged eye-witnesses about the occurrence, of the improbable nature of their stories and of the fact that neither story tallies with the medical evidence in the case, it would be highly unsafe to convict the accused on testimony of this character.

There is the further consideration that this evidence such as it is was undoubtedly not given before the Police and that the doctor who made the post-mortem very rightly reserved his opinion as to the cause of death until he was satisfied that it could not have been due to poison.

In our view of the evidence and of the whole history of the case it is not nearly so improbable that the accused might have

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Bartley, J.

been responsible for the death of his wife as it is that the alleged eye-witnesses saw anything whatsoever of what actually happened.

In the result we must reject the Reference made by the District Magistrate and we must further set aside the conviction of the accused under section 323 of the Indian Penal Code and direct that he be acquitted.

The fine, if paid, will be refunded.

Roxburgh, J. :—I agree.

P. R.

Reference rejected : Conviction set aside.

APPELLATE CIVIL.

Before Mr. Justice N. G. A. Edgley.

CIVIL.

1940.

May, 7, 8.

SHEIKH TAMIZALI *alias* Md. TAMIZALI

v.

Md. NASARALI BHUIYA AND ANOTHER.*

Appeal barred—High Court, if can interfere in revision—Civil Procedure Code (Act V of 1908), section 115—Bengal Agricultural Debtors Act (Bengal Act VII of 1936), sections 8, 34—Validity of execution sale, if comes within purview of section 47 of the Civil Procedure Code—Execution sale, presumption of—Onus on the applicant to show illegality—Omission to serve notice under section 34, if affects the sale—Terms of section 34 Bengal Agricultural Debtors Act, if mandatory.

Although an appeal may be barred it is open to the High Court to interfere in the exercise of its revisional jurisdiction under section 115 of the Code of Civil Procedure, if it is found that the courts below have taken an erroneous view of the law with regard to this matter and have acted illegally in the exercise of their jurisdiction.

Kumar Prafulla Krishna Deb v. *Nosibannessa Bibi* (1) referred to.

*Appeal from Appellate Order No. 162 of 1939, against the order of S. M. Masib, Esq., District Judge of Mymensingh, dated the 18th March, 1939, affirming that of Santosh Kumar Ghosh, Esq., Munsiff, First Court, Netrokona, dated the 17th February, 1939.

(1) (1916) 24 C. L. J. 331.

Civil.

1940.

Sheikh Tamizali
v.
Md. Nasarali Bhuiya

All proceedings for the execution of decrees for debts included in an application under section 8 of the Bengal Agricultural Debtors Act should be automatically stayed as soon as the application was filed before a Board and for this purpose it was provided under section 34 of the Act that due notice with regard to such application should be given to a civil court,

The terms of section 34 of the Bengal Agricultural Debtors Act are mandatory.

The question as to the validity of an execution sale is clearly a matter which arises between the parties to the suit and relates to the execution of the decree and therefore falls within the purview of section 47 of the Code of Civil Procedure.

When once an execution sale has been held there is a strong presumption to the effect that it was validly held by a court which acted in the exercise of its ordinary jurisdiction but in such a case the onus would lie heavily upon the applicant to show that the sale was in fact illegal on the ground that before the sale he had applied to the Debt Settlement Board for the settlement of his debts and had included in his application the debt in respect of which the execution proceedings had been taken which resulted in the sale. If the applicant is able to discharge this onus, the court will have no option but to set aside the sale even if it had received no notice under section 34 of the Bengal Agricultural Debtors Act.

So even if the debt had been extinguished by the execution sale, it would revive after the sale had been set aside and the provisions of the Bengal Agricultural Debtors' Act would apply thereto.

Appeal by the Judgment-debtor upon dismissal of an application under section 47 of the Code of Civil Procedure.

The material facts will appear from the judgment.

Messrs. Birendra Kumar De and *Abani Kanta Roy* for the Appellant.

Messrs. Ramendra Chandra Roy and *Chandra Nath Mukherjee* for the Respondents.

The judgment of the Court was as follows :

May, 8.

Edgley, J. :—The judgment-debtor is the appellant in this case and the appeal arises with reference to the dismissal of an application filed by the judgment-debtor under section 47 of the Code of Civil Procedure, in which he sought to set aside an execution sale.

It appears that the decree-holder obtained a decree for rent against the appellant on the 12th of July, 1937. On the 28th of May, 1938 he put his decree into execution and the requisite processes had been served by the 14th of June, 1938. On the 30th of June, 1938 the appellant applied to the Debt Settlement Board for the settlement of his debts and he alleged, the rent decree which the

decree-holder was seeking to execute was included in the application under section 8 of the Bengal Agricultural Debtors Act. He maintained that the Debt Settlement Board in due course issued a notice under section 34 of the Act but, in spite of the issue of this notice, the execution sale was held on the 9th of August, 1938. Thereafter, on the 11th of November, 1938, the appellant applied to the court under section 47 of the Code of Civil Procedure to have this sale set aside. Issues were framed by the trial Court with regard to the question of the maintainability of the application and also on the points whether or not the application to the Board was a bar in respect of the subsequent proceedings in execution and whether the sale was vitiated by reason of the alleged issue of the notice under section 34 of the Bengal Agricultural Debtors Act. Although it was decided that the application was maintainable, the other two points were decided against the appellant and the trial Court held that in fact no notice under section 34 of the Bengal Agricultural Debtors Act had been issued by the Board and that in these circumstances the sale which was held on the 9th of August, 1938 could not be impeached by the appellant. The judgment-debtor thereafter appealed to the learned District Judge of Mymensingh and his appeal was dismissed.

The main point which has been argued on behalf of the appellant in this case is that, in view of the fact that an application had been made to the Debt Settlement Board under section 8 of the Bengal Agricultural Debtors Act, which included the decree which was the subject-matter of the execution proceedings in Execution Case No. $\frac{54}{C}$ of 1938, the Court had no option but to set aside the sale under section 47 of the Code of Civil Procedure as soon as the fact had been brought to its notice that the application had been actually made to the Board and, in this connection, it was further contended that the non-receipt of the stay order under section 34 of the Bengal Agricultural Debtors Act must be regarded as immaterial. With regard to this matter it may be noted that the appellant places particular reliance upon the provisions of section 35 of the Bengal Agricultural Debtors Act. This was a point which was not directly raised in either of the Courts below but, as it involves an important question of law, there is no reason why it should not be raised in this Court.

In the first place, it has been argued by the learned Advocate for the respondents that no appeal lies to this Court having regard

to the principles laid down in the case of *Kumar Prafulla Krishna Deb* v. *Nosibannessa Bibi* (1). In view of the fact that the decree which it was sought to execute was in respect of a sum of Rs. 19-11 6 only this contention must be accepted having regard to the provisions of section 153(a) of the Bengal Tenancy Act. At the same time, I am of opinion, for the reasons which will presently appear, that the Courts below have taken an erroneous view of the law with regard to this matter and have acted illegally in the exercise of their jurisdiction. It is, therefore, open to this Court to interfere in the exercise of its revisional jurisdiction under section 115 of the Code of Civil Procedure.

The learned Advocate for the appellant in this case, as already pointed out, relies mainly upon the provisions of the first part of section 35 of the Bengal Agricultural Debtors Act, which is in the following terms :—" Notwithstanding anything contained in any Act, no decree of a Civil Court or certificate under the Bengal Public Demands Recovery Act, 1913, shall be executed (i) for the recovery of a debt included in an application under section 8 or in a statement under sub-section (1) of section 13, until

(a) the application has been dismissed by the Board in respect of such debt; or

(b) an award in which such debt is included has ceased to subsist under sub-section (5) of section 29" * * * His argument is to the effect that, as soon as an application to Board is made under the provisions of section 8 of the Act, the Civil Court loses its jurisdiction to execute any decree which may have been included in the application in question. He admits that, according to the ordinary procedure which should be followed by Debt Settlement Boards, a notice under section 34 of the Act should be issued to the Court concerned and that, on receipt of such notice, the Court should stay all further proceedings in the matter. He contends, however, that, in a case in which the Board failed to fulfil its duty under section 34 and the execution was held by reason of such failure, it would be open to the judgment-debtor himself to bring the matter to the notice of the executing Court which would be bound to set aside the sale if the judgment-debtor succeeded in showing that he had duly applied for the settlement of his debts under section 8 of the Act and his application included the decree which had been put into execution by the sale in question.

(1) (1916) 24 C. L. J. 331.

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Edgley, J.

The main argument of the decree-holder is to the effect that the question of the illegality of the sale should be pleaded at the proper stage of the execution proceedings before the sale actually took place. He contends that such a plea should be regarded as a plea in bar which should be deemed to be waived unless such plea is expressly taken before the sale. In support of this contention reliance is placed upon the decision of the Madras High Court in the case of *Moturi Seshayya* v. *Sree Rajah Venkatadri Appa Row Bahadur Zemindar* (1). In that case the learned Judges observed that "It must be remembered that the plea of *res judicata* is one which does not affect the jurisdiction of the Court, but is a plea in bar of a trial of a suit or an issue, as the case may be, which a party is at liberty to waive". This case was cited with approval by this Court in the case of *Rajani Kumar Mitra* v. *Amjaddin Bhuiya* (2) in which the learned Judges observed that "If a party does not put forward his plea of *res judicata* in a suit he must be taken, to have waived it or it must be taken to be a matter which ought to have been made a ground of attack and deemed to have been a matter directly and substantially in issue in the suit under explanation (IV) of section 11 of the Code of Civil Procedure." In the cases cited above it would appear that the plea of *res judicata* had not been expressly taken in the pleadings and it was on this account that it was held that this defence had been waived. In the present case, however, it cannot be said that the appellant had at any time waived his right to rely on the provisions of section 35 of the Bengal Agricultural Debtors Act. As soon as he filed his application to the Debt Settlement Board on the 30th of June, 1938, he was justified in assuming that the Board would comply with the mandatory requirements of section 34 of the Act and would issue a notice to stay all further proceedings in execution of the decree in respect of any debt which might have been included in his application. Ordinarily, therefore, no occasion would have arisen for him to inform the Court that he had actually made an application to the Board for the settlement of his debts or to contend that by reason of such application the decree had become incapable of execution. In this view of the case the decisions upon which the learned Advocate relies are of little avail to him.

In my view, there can be no doubt that the intention of the Legislature was to provide that all proceedings for the execution of decrees for debts included in an application under section 8

(1) (1916) 36 I. C. 289; 31 M. L. J. 219. (2) (1928) 48 C. L. J. 577 (579).

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should be automatically stayed as soon as the application was filed before a Board and, for this purpose, it was provided under section 34 of the Act that due notice with regard to such application should be given to the Civil Court. The terms of this section are mandatory inasmuch as it says that "* * * * the Board shall give notice thereof to such Court in the prescribed manner, and thereupon the suit or proceeding shall be stayed until the Board has either dismissed the application in respect of such debt or made an award thereon." At the same time, in view of the language of section 35 of the Act it is impossible to hold that it could have been the intention of the Legislature that a judgment-debtor should be deprived of a valuable right which had been conferred upon him by the Act by reason merely of some carelessness on the part of the Board, which might result in failure to issue the required notice.

It is contended on behalf of the respondent that, when once a rent sale has been held the debt must be regarded as satisfied and the matter will, therefore, no longer fall within the scope of the Bengal Agricultural Debtors Act and that a rent sale which has been held by the Civil Court in the exercise of its jurisdiction cannot be set aside under section 47 of the Code of Civil Procedure in a case such as that with which we are now dealing. I am not prepared to accept this contention. The question as to the validity of the execution sale is clearly a matter which arises between the parties to the suit and relates to the execution of the decree and therefore falls within the purview of section 47 of the Code of Civil Procedure. At the same time, when once an execution sale has been held, there is a strong presumption to the effect that it was validly held by a Court which acted in the exercise of its ordinary jurisdiction. This being the case, the onus would lie heavily upon the applicant to show that the sale was in fact illegal on the ground that before the sale he had applied to the Debt Settlement Board for the settlement of his debts and had included in his application the debt in respect of which the execution proceedings had been taken, which resulted in the sale. If the applicant is able to discharge this onus, in my opinion, the Court would have no option but to set aside the sale even if it had received no notice under section 34 of the Bengal Agricultural Debtors Act. The result would therefore be that even if the debt had been extinguished by the sale it would revive

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after the sale had been set aside and the provisions of Bengal Agricultural Debtors Act would apply thereto.

The question whether or not the application under section 8 of the Bengal Agricultural Debtors Act had actually been made by the appellant to the Debt Settlement Board and whether this application included the decree which he sought to execute in Execution case No. $\frac{54}{C}$ of 1938 has not been considered by the Courts below. This being the case, the decisions of both the Courts must be set aside and this case is remanded to the trial Court for further consideration in the light of the above observations. The appeal is, accordingly, allowed.

Costs will abide the final result.

The hearing-fee in this Court is assessed at three gold mohurs.

The order will, however, not have the effect of disturbing the findings of the trial Court with regard to the maintainability of the application and the further finding to the effect that no notice under section 34 of the Bengal Agricultural Debtors Act was actually issued by the Board.

P. R.

Appeal allowed; Case remanded

APPELLATE CRIMINAL

Before Mr. Justice A. G. R. Henderson and Mr. Justice N. A. Khundkar

CRIMINAL.
1939.
July, 4.

SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL

v.

KSHITISH CHANDRA BANERJEE.*

Bengal Food Adulteration Act (VI B C. of 1919), sections 4 and 6—Presumption under section 4 of the Act—Such presumption, how rebutted—Certificate of analyst, presumption of accuracy—Bengal Food Adulteration Act (VI B C. of 1919), section 14(2)—Slight variation in standard, if justifies the court to raise presumption—Nothing wrong with iodine value but saponification value excessive—Presumption under section 4, if could be raised.

There can be no hard and fast rule that the accused person should be tied down to any particular method for establishing his defence and rebutting the presumption under section 4 of the Bengal Food Adulteration Act.

The presumption under section 4 of the Bengal Food Adulteration Act would be rebutted if the accused could call evidence which satisfies the court that the article in question is derived exclusively from mustard seeds.

Although under section 14 sub-section (2) of the Bengal Food Adulteration Act, the certificate of an analyst is made evidence without formal proof, there is no presumption that it is accurate.

Where there are conflicting reports from experts a slight variation from the standard would justify the court in refusing to raise a presumption at all.

Where it is found by the analyst that there was nothing wrong with the iodine value but the saponification value was excessive the presumption under section 4 of the Bengal Food Adulteration Act should be raised.

Appeal by the Crown against the order of acquittal under section 417 of the Code of Criminal Procedure.

The accused was convicted by a Magistrate for an offence punishable under section 6 read with section 21 of the Bengal Food Adulteration Act but acquitted on appeal by the Sessions Judge.

The material facts will also appear from the judgment.

Messrs. S. M. Bose, (Advocate-General), S. K. Basu and Ajoy Kumar Basu for the Crown.

*Government Appeal No. 5 of 1939, against the order of T. B. Jameson, Esq. Sessions Judge of Jalpaiguri, dated the 27th February, 1939, reversing the order of D. N. Hoque, Esq., Magistrate, First Class of Jalpaiguri, dated the 7th December, 1938.

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Mr. Probodh Chandra Chatterjee for the Accused (Respondent).

The judgments of the Court were as follows :

Henderson, J. :—This is an appeal by the Local Government under section 417 of the Code of Criminal Procedure against an order of acquittal passed by the learned Sessions Judge of Jalpaiguri. The accused was convicted by a Magistrate of an offence punishable under section 6 read with section 21 of the Bengal Food Adulteration Act.

The accused has a shop in a Bazar named Barnes in the district of Jalpaiguri. On the 21st of July, 1938 the Assistant Health Officer purchased 12 ounces of mustard oil for the purpose of chemical analysis. In accordance with the procedure laid down under the rules the oil was placed in three bottles which were sealed, one of the bottles being made over to the accused. One bottle was sent to the analyst employed by the District Board. The accused's bottle was sent at his request to the Government Test House at Alipur to be analysed. As a result of the analysis made by the analyst of the District Board, which showed that the oil was adulterated, the accused was put on his trial and convicted.

The point of law urged on behalf of the Crown in the appeal is concerned with the interpretation of section 4 and section 20 of the Act. Section 4 lays down that in certain circumstances a presumption is to be drawn that the article in question is not genuine. There can be no doubt that, if the certificate given by the District Board analyst is accepted, in view of the rules framed by the Local Government under section 29 (2) (a) the mustard oil was not genuine. It is plain from his judgment that the learned Sessions Judge appreciated this. But according to the submission of the Crown he has stultified this provision of the law by the way in which he dealt with the question whether the presumption had been rebutted.

The learned Advocate-General put forward two points. His first contention was that the presumption could only be rebutted by following the oil from the mustard seeds throughout the process of manufacture right up to its arrival in the shop of the accused and demonstrating that no deleterious substance had been introduced. In the second place he argued as an alternative that the only other way in which the presumption could be rebutted is by the accused proving that there was no adulterant, common or rare, of any sort in the oil.

In support of the first proposition he relied on a series of English cases which were concerned with the interpretation of section 6

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of the Sale of Food and Drugs Act of 1875. Under the provisions of that section no person shall sell to the prejudice of the purchaser any article of food which is not of the nature, substance and quality of the article demanded by the purchaser under a penalty. Section 4 makes provision for the raising of a presumption in circumstances similar to those in the Bengal Act.

The first of these decisions is that of *Hunt* v. *Richardson* (1) which was heard by a court of five Judges in the Kings Bench Division. They differed by 3 to 2. They were largely concerned with the meaning to be attached to the provisions of section 6 which have no application to the Bengal Act. The only decision which goes so far as the contention of the learned Advocate-General is that in *Jenkins* v. *Williams* (2) decided last April in which the accused was not represented. In my opinion the weight of the decisions is not in favour of this contention.

Then again all these cases were concerned with milk which is quite a different commodity from mustard oil. It is produced by an animal and sold within a few hours of its production. There can be no difficulty in tracing its history in any particular consignment from the animal to the distributor. If such a rule were to be applied to mustard oil, the burden cast upon the accused would be one which it would be quite impossible for him to discharge.

The question really depends upon the terms of section 4 and section 6. The presumption raised under section 4 is that the article is not genuine. Section 6 lays down that mustard oil must be derived exclusively from mustard seeds. We cannot find any warrant for the proposition that the accused person can be tied down to any particular method for establishing his defence.

On the second point the judgment of the learned Judge was criticised with regard to this passage :—

"The only conclusion I can come to on the evidence and the two reports before me is that the report submitted by the defence comes nearer to showing that the oil is pure mustard oil than the report of the prosecution to showing that it is adulterated. In my opinion when the common adulterants are proved to be absent the prosecution should show what the actual adulterant is because the presumption arising under the rules is for all practical purposes rebutted."

The contention of the learned Advocate Geneeal was that this is to render the provisions of section 4 nugatory. He contended that the true position is exactly the opposite and that the presump-

(1) [1916] 2 K. B. 446. (2) (1939) 160 Law Times 507.

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tion is not rebutted unless the accused himself proves that no adulterant of any sort is present.

In our judgment neither of these views is correct. If the learned Judge meant that, when the accused shows that none of the common adulterants was present, the court must hold that the presumption has been rebutted then. In our opinion he went too far. In the present case unless he was prepared to hold himself on the evidence that the presumption was fully rebutted, he should have upheld the conviction. On the other hand the contention of the learned Advocate General goes too far in the other direction as it ignores the precise point which the accused was to prove. I will repeat the relevant provisions of that Act. Under section 4 there is a presumption that the article is not genuine. Under section 6 genuine mustard oil must be derived from mustard seeds. The presumption is rebutted if the accused calls evidence which satisfies the Court that the article in question is derived exclusively from mustard seeds.

Turning to the facts of the present case the first point for determination is whether the presumption is to be raised at all. Under section 14 (2) of the Act the certificate of the analyst is made evidence without formal proof; but there is no presumption that it is accurate. In the present case we have conflicting reports by two experts whose integrity has not been and cannot be called in question. It is thus abundantly plain that errors are possible and a slight variation from the standard might justify the Court in refusing to raise a presumption at all. In the present case the District Board analyst found nothing wrong with the iodine value. Both the analysts found that the saponification value was excessive. In these circumstances we are of opinion that the presumption should be raised.

It remains to be considered whether it has been rebutted. It has been proved that none of the common adulterants were present. This has obviously taken the accused a very long way towards his goal. The chemical assistant in the Government Test House who made the analysis is thoroughly competent. He formed the opinion that the mustard oil was genuine. He further explained the different mustard seeds give different saponification value owing to the peculiar properties of the seeds. This is quite enough to account for what was found in the present case. We accept that opinion and in view of that opinion it must be held that the presumption has been rebutted.

The appeal is dismissed.

Khundkar, J. :—I agree.

P. R. *Appeal dismissed.*

ORIGINAL CIVIL.

Before Mr. Justice H. R. Panckridge.

PULIN KRISHNA MUKHERJEE

v.

ADYA NATH MUKHERJEE AND OTHERS.*

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1940.

January, 25

Hindu Law - Gift of the office of shebaitship, if valid—Custom—Partition of joint Palas, how far permissible - Holder of a religious office, if can be compelled to sell his Pala.

It is not in every case, where questions of Debsheba arise that the idol should be made a party.

The idol need not be separately represented where the main question was the transferability of the shebaitship and the secondary issue was the partition of the joint Pala :

Brojendra Nath Seal v. *Lalit Mohan Seal* (1) and *Promatha Nath Mullick* v. *Pradyumna Kumar Mullick* (2) referred to

There is no absolute prohibition against gift of the office of shebaitship. The transferability of the office of shebait by way of gift depends upon custom.

Where a plaintiff succeeds in proving that a custom exists whereby the Palas of the deity are transferred he is entitled to a declaration that he is entitled to the shebaitship, Pala or turn of worship by virtue of a deed of gift.

It is wrong to compel the holder of a religious office to sell his right to the Pala against his wishes.

But there is no legal bar to partitioning the joint Palas by giving each shebait a turn of worship in rotation, when the shebaits have a material and proprietory interest in the offerings.

Suit for a declaration that the Plaintiff is entitled to the Shebaitship and for partition of certain joint Palas or in the alternative a direction for sale of the joint Pala.

The material facts will appear from the judgment.

Mr. S. C. Mitter for the Plaintiff.

Mr. G. C. Sett for the Defendant Adyanath.

Mr. M. N. Dutt for the Defendant Sm. Narayani Debi.

*Original Suit No. 51 of 1938.

(1) (1926) 45 C. L. J. 41.

(2) (1925) L. R. 52 I. A. 245 ; 41 C. L. J, 551.

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The judgment of the Court was as follows :

Panckridge, J. :—In this suit the plaintiffs seek to obtain a declaration that he is entitled to the Shebaitship and Pala or turn of worship, particulars of which are given in paragraph 10 of the plaint. His claim was based on a registered deed of gift of August 14, 1929, whereby the plaintiff's father, Nibaran Chandra Mukherjee, purported in consideration of natural love and affection to transfer to the plaintiff his (the donor's) right, title and interest, to and in the worship of the deity Sree Sree Sidheswari Thakurani and in his several Palas or turns of worship.

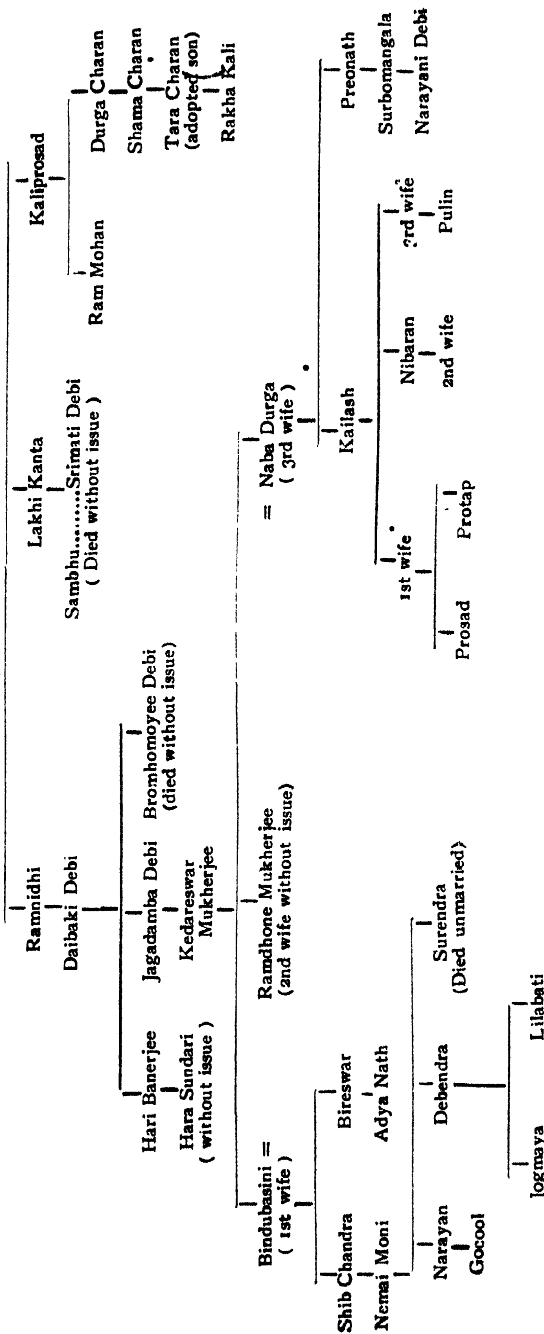
The plaintiff also asks for the partition of a certain joint Pala among the parties entitled thereto, or in the alternative a direction for the sale of the said joint Pala to the highest bidder among the parties to the suit. The most complete pedigree of the family with which we are concerned is to be found in the written statement of the defendant Adya Nath Mukherjee.

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Of the four defendants Gocul Chandra Mukherjee and Panchcowrie Banerjee do not appear. The defendant Adya Nath Mukherjee does not contest the plaintiff's claim to a declaration, and his opposition has been limited to the plaintiff's demand to have the joint Pala partitioned, and in particular to the proposal that it should be sold to the highest bidder among the parties.

The substantial contest is that between the plaintiff and the defendant Narayani Debi. In paragraph 14 of the plaint the plaintiff alleges that by custom the Pala is transferable. This allegation is traversed in paragraph 4 of Narayani's written statement, which goes on to state that the shebaitship was all along vested in the heirs of the founder and there was no custom to the contrary.

All parties agree that the Hindu Law as regards the transferability of the office of shebait by way of gift is accurately summariz d at page 487 of the late Sir Dinshaw Mulla's "Principles of Hindu Law," 8 h edition.

It will be convenient to set out the relevant passage. "Gift—Though a sale of a religious office is void, there is no absolute prohibition against a gift of such an office. Cases of this kind generally arise where the founder of an endowment has reserved the right of management to his own family, or has conferred it upon some other family. In such a case, it is competent to the Shebait to renounce his right of management and transfer it to a person standing in the line of succession, provided the transferee is not disqualified by personal unfitness. Similarly, where there are several joint shebaits, they may renounce their right in favour of any one of them, provided the arrangement is for the benefit of the endowment. But a gift of the right of management made to a stranger is not valid, unless it is sanctioned by custom."

The first document relied on by the plaintiff is the will of Shamboo Chandra Chakravarty a grandson of the founder of the endowment, Ananta Ram Chakravarti. That document is dated November 24, 1923, and a copy is annexed to a Bill of Complaint filed on the Equity Side of the Supreme Court in 1812. The testator specifically mentions his interest in the Shebaitship in the words " and as for and concerning my interest in and to the Idol Sree Sree Sidheswari Thakurani and her temple and all her estate and effects and also to the profit arising from the offering to the said Thakurani and to perform her ceremonies" and he bequeathed this interest along with the rest of his estate to Ramdhone Mukherjee.

Another testamentary document which has been put in evidence is the will of Shib Chandra Mukherjee, dated July 17, 1890. This

document in itself does not seem to me to carry matters any further, because the Shebaitship is not specifically referred to, for the will is a simple document, bequeathing a life interest in the testator's entire estate to his wife with remainder to his sons and grandsons in equal shares.

It must however be mentioned here that in Suit No. 244 of 1891, which was a partition suit in which Nibaran was the plaintiff, Shib Chandra's will was considered by Sale, J. who held that the terms of the will were sufficiently wide to pass the whole estate including the right to worship to the testator's widow for life.

In this suit a compromise was effected by a deed of settlement, to which Nibaran, Bireswar, Sarbamangala (widow of Preonath) and Nemaimoni were parties, dated December 6, 1892. Clause 3 deals with those days of the Sheba when the worship is 'cyclical' and not joint, and contains a proviso whereby Sarbamangala leases her Pala for consideration to Bireswar for a period of five years.

With regard to the joint Pala the position is as follows: Since the days of Ramdhone, the grandfather of Nibaran and Adya Nath, the Sheba has been performed jointly on certain festival days when the offerings are unusually valuable, these offerings being subsequently divided among the Shebaits according to their shares. These days are six in number, being four days of the Durga Puja, one day of Kali Puja, and one day of the Ratanti Puja. With regard to this joint Sheba, clause 4 of the deed provides as follows: "It is further declared that keeping the joint Pala joint, that is, in common, we have divided and taken our ancestral separate seventeen days Pala in the above manner, and we four persons declare that none of us, four persons and our heirs and representatives shall ever be at liberty to urge objection or plea with regard to the holding of the said Palas in the above manner. Should we or they raise any objection or plea it would be void and rejected by the Court."

Sometime after the termination of the leasehold interest granted by Sarbomangala to Bireswar under the deed of December, 6, 1892 she again leased out her Pala of four and a quarter-days by way of mortgage to Adya Nath for a period of seven years. Narayani was a party to this document in which she acknowledged that its terms were binding on her.

With regard to the interest of the fourth defendent Panchcowrie Banerjee the position is this. The line of Kali Prosad, the founder's third son came to an end with the death of Tara Charan Chakravarti, the adopted son of Shama Charan, Kali's grandson. Tara

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Charan died childless his sole heir being his widow Rakhakali. This lady on May 17, 1905, executed a conveyance wherein she recited that she was absolutely entitled to a Pala of thirteen days in every month and to a two-fifths share in the joint Sheba: She then proceeded to convey her Pala and her share in the joint Sheba to her brother Kalipada Banerjee, for the consideration therein named, such consideration being the payment of the balance of the profits of the Sheba to herself for her natural life.

Kalipada is now dead, and his interest has devolved upon his son the defendant Panchcowrie. On September 8, 1913, shortly after the death of Rakhakali Nibaran instituted a suit against Kalipada (No. 942 of 1913), asking for a declaration that the defendant Kalipada had no interest in the deity, or its Sheba, or its properties. This suit was compromised in terms of a deed of settlement executed on April 2, 1914. To this deed the defendant Adya Nath was a party, though Narayani, in spite of the fact that she was impleaded in the suit, was not. The deed recites that there is a long standing custom of alienation of Shebaitship by deed and will or either of them. In the face of this recital Adya Nath's counsel has felt it impossible to question the existence of the custom. The operative part of the deed conveys certain days of the thirteen days of Kalipada's Pala to Nibaran and Adya Nath and also fractional shares in the joint Pala. Kalipada died in 1926. Prior to this Jogmaya and Lilabati daughters and heiress of Debendra, the second son of Shib Chandra, had sold one-third of their Pala to Gocool.

These are all the relevant facts.

A technical issue as to non-joinder was raised.

First it was said that the deity should have been made a party. Since the decision of the Judicial Committee in *Promatha Nath Mullick* v. *Pradyumna Kumar Mullick* (1) this is a contention which is advanced almost as a matter of course.

However as was pointed by C. C. Ghose, J. delivering the judgment of the Court in an appeal from the Original Side *Brojendra Nath Seal* v. *Lalit Mohan Seal* (2) that case is no authority for the broad proposition that in every case, where questions of Deb-sheba arise, the idol is a necessary party to be brought on the record.

In the present case the main question i. e., the transferability of the Shebaitship cannot depend upon the will of the idol. As to the secondary issue which is concerned with the claim for

(1) (1925) L. R. 52 I. A. 245; 41 C. L. J. 551.
(2) (1926) 45 C. L. J. 41.

partition of the joint Pala, inasmuch as I do not propose to disturb the *status quo*, I see no reason to have the idol separately represented.

It was further suggested, though the contention was not very vigorously urged, that Nibaran's other two sons, the plaintiff's half brothers Protap and Prosad, as also Jogmaya and Lilabati should have been impleaded.

I confess that I do not see on what principle these parties should be joined, although of course any decree made in the suit in no way binds them. On the main question I have come to the conclusion that the plaintiff has succeeded in proving that a custom exists whereby the Palas of the deity are transferable.

The language of the will of Sambhoo Chandra, which was executed as long ago as 1823, is to all intents and purposes a specific bequest of the Pala.

The only instance in which a transfer has been called in question is Nibaran's suit of 1913 which was eventually compromised in terms of a document which expressly recognizes the transferability of the Pala.

There is force in the contention that some of the transfers on which the plaintiff relies, as for example the leases by Sarbomangala and Narayani and the sale by Jogmaya and Lilabati, are open to attack on the ground that they are for consideration, but the fact remains that, although they might possibly have been set aside at the instance of the other Shebaits, they have in fact been accepted.

In these circumstances I hold that the plaintiff is entitled to the declaration for which he asks in paragraph (a) of the prayer to the plaint.

On the other hand I reject his claim for partition of the joint Palas. In so far as he seeks to have the joint Pala put up for sale, I consider that it will be contrary to principle to make such an order, as in my view it would obviously be wrong to compel the holder of a religious office to part with it against his wishes for a pecuniary consideration.

As to partitioning the joint Palas by giving each Shebait a turn of worship in rotation there is in my opinion no general legal objection to such a course, since cases like *Sri Raman Lalji Meharaj v. Sri Gopal Lalji Meharaj* (1) do not apply when, as here, the Shebaits have a material and proprietory interest in the offerings. I find however the plaintiff has failed to show that, as he alleges in paragraph 13 of the plaint, it has become impos-

(1) (1897) I. L. R. 19 All. 428.

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sible owing to disputes and differences to carry on the Sheba jointly.

But apart from this I consider that the deed of settlement of December 6, 1912 to which Nibaran was a party is a bar to any claim on the part of a Shebait to partition.

In an earlier part of this judgment I have set out the terms of clause 4 of that document in extenso and there is no need to repeat them. They have become part of a decree of the Court, and I think that in the circumstances *Cowasji Temulji* v. *Kisandas Ticumdas* (1) is of assistance. In that case certain predecessors-in title of the parties had consented to a decree which provided *inter alia* that the land in suit should not be partitioned. In dealing with the plaintiff's claim for a partition decree the Court observed ;*—

"Apart from that clause in the consent decrees which affects to prohibit partition, we think it clear that, as tenants in common, the plaintiffs would be entitled to partition.

"But the question is whether in this suit the plaintiffs are entitled to give the go-by to a particular clause in an existing decree on the ground that that clause, if resting on no higher authority than the agreement between the parties, would be bad in law. We think that this question must be answered in the negative. It may be—though we express no opinion as to this—that in a suit properly framed for that purpose the plaintiffs might have been able to get the decree set aside. But no such suit has been brought, and the decree is a subsisting decree ; nor does it, we think, make any difference that it was taken by consent of the parties who were all *sui-juris*. The decree stands, and, while it stands, it operates as an estoppel between the then parties and their present representatives."

In the result the plaintiff has partly succeeded and partly failed. I see no reason why the Debuttar estate should be burdened with the entire costs of the litigation. I therefore make no order as to the costs of the plaintiff and of the defendant Narayani. The defendant Adya Nath has not resisted the declaratory decree for which the plaintiff asked, but he has successfully opposed the prayer for partition or sale of the joint Sheba. In these circumstances he may have his taxed costs out of the Debutter estate.

S. C. Datta & Co : Attorneys for the Plaintiff.

J. K. Bose, Pal & Roy and *J. K. Halder* : Attorneys for the defendants.

P. R. *Suit decreed in part.*

(1) (1911) I. L. R. 35 Bom. 371.
* At page 378 of I. L. R. 35 Bom.—Ed.

PRIVY COUNCIL.

PRESENT : *Lord Atkin, Lord Thankerton, Lord Porter and Sir Lancelot Sanderson.*

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1940.
March, 18.

THE GUJARAT GINNING & MANUFACTURING COMPANY, LIMITED

v.

V. GOVINDAN NAIR.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY.]

Dismissal of an employee—Misconduct—Habitual negligence—Summary dismissal, when to be excused—Onus of proof in an action for damages for wrongful dismissal—Continued failure to accomplish a reasonable quantity of work, if entitles the defendant to dismiss the plaintiff.

Habitual negligence of a serious character or misconduct on one occasion only if sufficiently gross would justify the dismissal of an employee.

Boston Deep Sea Fishing and Ice Co. v. *Ansell* (1) referred to.

Summary dismissal is a drastic step and if it is to be excused the acts or neglects of the servants of which complaint is made must be of a serious nature and such as to show that he is not carrying out his part of the bargain in a matter going to the root of the contract.

In an action for damages for wrongful dismissal, where the case of the defendants was that the plaintiff was habitually neglectful of his duties, the onus of proof was upon them to justify their action.

Continued failure to accomplish a reasonable quantity of work, more particularly if accompanied by sufficient evidence of repeated bad workmanship might entitle the defendants (appellants) to dismiss the plaintiff (respondent). Identical conditions, identical work and the presence of the same workmen working in the same way if proved to the satisfection of the Court might be some ground for justifying a dismissal but that would not necessarily be sufficient.

Privy Council Appeal No. 21 of 1939, from a decree of High Court, Bombay, dated 21st September, 1936, reversing the decision of Mr. Justice Barlee dated 6th April, 1936, sitting on the Original Side of the High Court.

D. N. Pritt, K.C. and *J. M. Parikh* for the Appellants.

C. S. Rewcastle, K. C., S. P. Khambatta and *J. L. Roy* for the Respondent.

(1) (1888) 39 Ch. Div. 339.

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Their Lordships' judgment was delivered by

Lord Porter : In this appeal the respondent, who was the plaintiff in the action, claims damages for wrongful dismissal. The trial Judge on the 6th April, 1936, passed a decree in favour of the appellants (defendants), but on the 21st September, 1936, this decree was reversed by the High Court sitting as a Court of Appeal.

The respondent was employed by the appellants under a contract in writing dated the 13th April, 1931, in the following terms :—

"Date, Bombay, the 13th April, 1931.

"To

"Messrs, Jamnabhai Mansukbhai.

"Agents, The Gujrat Ginning and Mfg. Co., Ltd.,

"Ahmedabad.

"Dear Sirs,

"This is to inform you that I have agreed to serve your company as the Dyeing, Bleaching and Finishing Master in full charge of the company's Bleaching, Dyeing and Finishing Department from the date of my joining the appointment and to be the sold head of the department and I shall work as such under your directions.

"1. This agreement is for a period of three years and to be determined thereafter by either of us.

"2. My salary is fixed at Rs. 1,200 per month payable on the last day of each month.

"3. In addition to the above-mentioned salary you agree to pay me the sum of Rs. 60 per month for house allowance and likewise provide me with sufficient furniture or alternatively pay me an amount of Rs. 1,000 (one thousand) to enable me to purchase the furniture which remains your property subject to reasonable wear and tear.

"4. I shall devote myself personally to the work of my department in the Company during the usual working hours for heads of department in your mill and shall not connect myself directly or indirectly with the business of any other firm or company manufacturing piece goods or doing bleaching, dyeing and finishing work but I am at liberty to advise any firm or company doing the above work outside Gujrat.

"5. In the event of the Company terminating my employment

before the expiry of this agreement, the Company shall pay me the salary for the remaining period of the agreement as and when it usually becomes payable and I agree that I shall not connect myself with any firm or company doing business at Gujrat.

"6. I shall be entitled to leave on full pay for a period up to three months in all during the period of this agreement on account of illness.

"Yours faithfully,

"V. G. NAIR.

"Jamnabhai Mansukhbhai. 13.4.31."

In addition to the duties prescribed by this contract the respondent appears to have undertaken the supervision of the laboratory and calendering department. He began his work on the 11th June, 1931, and continued until he was summarily dismissed on the 28th July, 1932.

The grounds on which the appellants justified their action and the respondent's contentions appear in a letter of that date and two letters following it, the material portions of which are set out below :—

"The Gujarat Ginning and Manufacturing Co., Ltd.,

"Ahmedabad. 28th July, 1932.

"No. 1832.

"To

"V. G. Nair, Esq.,

"Dyeing and Bleaching Master.

"The Gujarat Ginning and Manufacturing Co., Ltd.,

"Ahmedabad.

"Dear Sir,

"We have extremely regret to have to inform you that you have failed to keep proper records enabling the Company to know the vital statistics about your department such as working costs, etc., and further due to gross negligence on your part the work of the department under you has resulted in great losses and they are still incurred, for which you are taking no measures.

"In the circumstances, we have to inform you that the Company is constrained to treat your conduct as breach of agreement by you and you are requested to hand over charge to Mr. Vadilal Mansukhram.

"A statement of the losses to the Company due to your conduct will be sent to you in due course.

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"Regarding furniture, you will please arrange to return the same by the 1st proximo, failing which rent will be charged.

"Yours faithfully,

"R. V. GURJAR,

Secretary."

"Madhar Bang Road,

"Ahmedabad. 28th July, 1932.

"Jivanlal V. Desai,

"Bar-at-Law.

"To

"Messrs. The Gujarat Ginning and Mfg. Co., Ltd.

"Dear Sirs,

"My client is quite ready and willing to perform his part of the contract for the full period of the agreement and to give you a chance he calls upon you to recall at once the letter sent to him over your Secretary's signature and allow him peacefully to perform his duties and pay him his salary for June which is now much overdue and arrange to pay him regularly under the terms of the agreement.

"If the letter under reply is not instantly withdrawn, my client will treat your conduct as amounting to wrongfully dismissing him and will take necessary steps to recover damages from you for his wrongful dismissal as provided for in the argeement between you and him dated 13th April, 1931.

"As the matter is very urgent a personal delivery of this letter is made on you and another copy is being sent by post.

"Yours faithfully,

"J. V. DESAI."

"The Gujarat Ginning and Manufacturing Co., Ltd.,

"Ahmedabad. 29th July, 1932.

"No. 1857.

"V. G. Nair, Esq.,

"Dyeing and Bleaching Master,

"Gujarat Ginning and Manufacturing Co., Ltd.,

"Ahmedabad.

"Dear Sir,

"In addition to the breach of agreement on your part by your failure to keep records of vital statistics and gross negligence, you

have further deliberately refused to obey the orders of the Company through its Secretary by not handing over charge and by continuing to persist in your conduct of coming to the mills to make show of attending to work. With the relation that you bear with the Company, it is necessary that you should not persist in that conduct and I have therefore to request you not to enter the mill premises any more and leave them after receipt hereof.

"Yours faithfully,

"R. V. GURJAR,

"Secretary."

The respondent thereupon took proceedings by plaint dated the 8th September, 1937, for damages for wrongful termination of the contract set out above. In answer the appellants justified their action by asserting that the respondent was habitually neglectful of his duties, and this assertion they supported by alleging that during the plaintiff's tenure of office the production of his department decreased and the percentage of damage increased in comparison with that existing in his predecessor's time. They also alleged that the respondent failed to keep proper records which would show the cost of the manufacture of the goods in his department. This particular plea originally stated that the records did not show such costs "at a glance" but it was admitted at the trial that it was impossible to keep records from which an immediate knowledge of the cost of production in that department could be obtained.

Feeling no doubt that grave misconduct must be proved in order to justify such drastic action on their part the appellants also alleged that repeated warning had been given the respondent, that he failed to remedy the matters complained of and that he was habitually neglectful. Founding their case on these allegations the appellants also by counterclaim asked for damages against the respondent for losses said to have been caused by his negligence.

In compliance with an order of the Court dated the 16th April, the appellants on the 1st May, 1934, furnished particulars of the habitual negligence they alleged. They were as follows :—

"(a) The plaintiff failed to keep proper records which would show the costs of production of the departments in his charge ;

"(b) The plaintiff failed to keep records of the materials used in his departments posted up to date ;

"(c) The plaintiff did not pay any heed to the various notes and letters addressed to him by the salesman of the defendants from

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time to time regarding the damage caused in various ways to the cloth while passing through his departments and did not give a satisfactory reply to or explanation for any of them ;

"(*d*) The plaintiff failed to take steps to increase the production in his departments although his attention was frequently drawn to the decrease of production in his departments ;

"(*e*) The plaintiff failed to keep keen and adequate supervision over the workman employed in his departments, with the result that the production decreased and the percentage of damage to cloth went on increasing."

The case was tried before Mr. Justice Barlee, beginning on the 10th March, 1936. The real issue contested was whether the plaintiff was habitually neglectful of his duties in the respects alleged in paragraphs (*d*) and (*e*) above, and the onus of proof was admittedly upon the appellants to justify their action.

Some evidence of bad bleaching and dyeing and of damage for which the respondent was said to be responsible was given and some rather vague evidence of oral complaints of such damage was called. There was also evidence of written complaints beginning in February, 1932, and continuing up to July of that year, and of the respondent's written replies in answer defending himself and explaining the cause. No written evidence of complaints of decreased production before the letters of dismissal was forthcoming and apparently no such oral evidence was given except in so far as it can be said that complaints of bad bleaching and bad dyeing led to fresh treatment of the material and so necessarily caused delay.

The main case of the appellants, however, rested upon a comparison of the results obtained by the respondent's predecessor one Hiralal and those obtained by the respondent himself. These were set out in tabular form and purported to show a falling off in production of 2,000 yards per day, and a tripled output of damaged goods.

Ultimately three serious complaints were levelled against the respondent, (1) the failure to keep proper books and to keep them duly entered up, (2) a substantial decrease in production and a failure to improve it though warned, (3) a considerable increase in damaged goods coupled with complaints continuing for at least five or six months and no consequential improvement.

The complaint as regards the books may be put aside. The learned Judge found fault in the case of one book only —as to its form he held there was no ground for blame, but it had not

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been written up for some months, though there was nothing to show that the material for writing it up was not duly kept. Indeed, such material must have been in existence since the book was written up after the respondent was called upon to do so. It is true that some nine days was taken over the task, but neither of the Courts in India regarded the matter as justifying dismissal, though Barlee J. regards it as serious. Their Lordships would have been more impressed with the gravity of the charge if it had been shown that access to the contents of the book had been required either frequently or quickly. In fact no request for its production appears to have been made until just before the respondent's dismissal. In the absence of such evidence they agree with the Appellate Court in regarding the fault as of a venial character, though no doubt it must be taken into consideration in determining whether the appellants were justified in the course they took.

So far as the other matters are concerned there is no doubt that habitual negligence of a serious character would justify the dismissal of an employee or indeed as was the case in *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (1), misconduct on one occasion only if sufficiently gross. But summary dismissal is a drastic step, and if it is to be excused, the acts or neglects of the servant of which complaint is made must be of a serious nature and such as to show that he is not carrying out his part of the bargain in a matter going to the root of the contract.

In the present case there is no act of dishonesty or disobedience, and the most that can be suggested is that there was incompetency in supervision resulting in slow and faulty work. It was on this part of the case that the learned Judge based his decision. Their Lordships are prepared to accept the view that continued failure to accomplish a reasonable quantity of work, more particularly if accompanied by sufficient evidence of repeated bad workmanship, might entitle the appellants to dismiss the respondents. They are far from saying that there was evidence in the present case of either inadequate production or excessive damage. Nor indeed did Barlee J. base his judgment on any such independent finding. He fastened rather upon the difference between the outturn of Hiralal and that of the respondent and held that inasmuch as the respondent fell substantially short of his predecessor, in both matters the dismissal was justified.

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The learned Judge's finding as to production is expressed in the words :—

"Defendant has proved a decrease in production in the bleaching department of 2,000 yards per day or about 10 per cent., a very serious matter, and the plaintiff has failed to explain it."

As to damage he says :—

"He" (the respondent) "claims that the percentage of damage in his time was not very high. This statement is not very useful. I can only judge him by the standard set by Hiralal, and so judged he must fail, as the percentage was much higher than it had been."

His general conclusion is summed up in the paragraph :—

"My conclusion on the evidence is that plaintiff's management of the bleaching department was not so efficient as Hiralal's. The agent of the Company found that there was a serious decrease in production accompanied by an increase in damage. He called for an explanation on the 5th July but none was supplied. He found, too, that there was lax supervision in the department office. He was, therefore, justified in determining the contract."

In their Lordships' view such a conclusion is not supported by the premises.

Beaumont C. J. in the Appellate Court pointed out, as their Lordships think, rightly :—

"All he [the respondent] has to do is to bring reasonable skill and diligence to bear on his work, and I doubt very much whether it would be possible in a case of this sort ever to prove negligence or incompetence merely by comparing the plaintiff's work with that of his predecessor."

Some attempt was made no doubt in the Court of first instance to show that the conditions in the time of the respondent and his predecessor were identical, or at least almost identical. If identical conditions, identical work and the presence of the same workmen working in the same way had been proved to the satisfaction of the learned Judge, some foundation for an argument on behalf of the appellants might have been established, though their Lordships are not prepared to accept it as necessarily being sufficient. But no such finding is made in the judgment. Rather it seems to have been considered to be enough that the respondent did not explain his failure to reach figures as successful as those of Hiralal. The onus was placed on him instead of on the appellants. Two sentences from his judgment will illustrate Barlee J.'s view : —

"I find it altogether impossible to find out what effect (if any)

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the changes in the classes of goods in the plaintiff's time had in the rate of production."

"What he has to explain then is why the percentage '(of damage)' increased to so great an extent during his period of service."

But a similar outlook is to be observed throughout the judgment, and in their Lordships' opinion the conclusion reached is founded upon this mistaken view.

Faced with the difficulty of supporting a judgment where the onus of proof is put upon the wrong party, the appellants sought to argue that as the respondent did not himself complain of the conditions under which the goods were produced, his failure to do as well as Hiralal and so wide a difference beween their results necessarily involved serious and continued negligence on the respondent's part. They pointed out that he had said in evidence :—

"Whenever I saw lower production I used to make inquiries. I never felt any general dissatisfaction. I was usually satisfied."

and again :—

"the old machinery did not reduce or retard production."

and :—

"From my point of view the criterion is yardage."

They admitted indeed that according to his evidence he had dealt with different and finer goods than those dealt with by Hiralal and that the yardage per lb. in his time was greater. But that assertion they alleged was disproved by a table which showed only a very slight increase in yardage per lb. The inevitable conclusion was said to be that in fact the type of cloth dealt with was to all intent similar.

In their Lordships' view a much more searching analysis of the facts and circumstances of the production in the two periods, viz., that during which Hiralal was in charge and that during which the respondent was engaged, would be necessary before any satisfactory conclusion could be drawn.

The type of cloth as well as its fineness may have made a difference, the machinery may have—indeed probably would have—deteriorated, and admittedly the respondent had made a report in February, 1932, pointing out the existence of many defects in it. Moreover, as Beaumont C. J. points out, the comparison was between the last year of Hiralal's time and the first year whilst the respondent was in charge, and indeed there are some indica-

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tions in the table produced of an improvement under the respondent both in production and quality in the course of the 15 months during which he served. Such possibilities of difference are illustrative only and not exhaustive, but they show the danger of forming a judgment on comparative results.

As to the alleged increase in damaged goods the respondent's contention was that the standard set was too high and that many of the faults attributed to him were actually due to carelessness in weaving.

Here again is a reason for distinguishing between the two sets of results, yet the learned Judge appears to have placed the onus upon the respondent of showing the existence of differences instead of looking to the appellants to show that conditions were identical. To draw a trustworthy inference it would be necessary to determine upon satisfactory evidence whether or not the standard of weaving was as high in the later period as in the former.

Moreover, quite apart from the question whether there was a diversity of conditions as between the two periods the respondent's duties were not the same as Hiralal's—he had undertaken the supervision of both calendering and the laboratory, duties from which his predecessor was free.

Their Lordships cannot think that a defence against a claim for wrongful dismissal can be proved in such a way. No complaints by the manager until just before the time of dismissal are suggested. Indeed the manager himself was never called. If the plaintiff did not complain of his conditions none save salesmen and those in subordinate positions complained of him.

Having regard to their opinion that the grounds on which the learned Judge thought the dismissal was justified could not be supported, their Lordships have not thought it necessary to examine the evidence meticulously. They agree with the criticisms and conclusion of the High Court in appeal and will humbly advise His Majesty that the appeal should be dismissed with costs.

H. S. L. Polak & Co : Solicitors for the Appellant.

T. L. Wilson & Co : Solicitors for the Respondent.

R. C. C./P. R. *Appeal dismissed.*

CIVIL REVISION.

Before Sir Harold Derbyshire, Knight, Chief Justice and Mr. Justice B. K. Mukherjea.

MOHENDRA NATH SARDAR AND ANOTHER

v.

KALIPADA HALDAR AND OTHERS.*

CIVIL.

1940.

June, 25, 26.

Usufructuary mortgage—Essential elements of—Document described as mortgage by conditional sale and the expression Kat Kobala used—Stipulations in such document, construction of—Transfer of Property Act (IV of 1882), section 58(d).

The essential element of an usufructuary mortgage was that the mortgagee would retain possession of the properties till the mortgage money was paid. The mere mentioning of a due date for payment was not material and could be considered as a mere proviso for redemption if the provision was that in default of redemption the mortgagees would continue to hold the property and go on enjoying the same till the mortgage money was paid.

Although no express words of transfer are mentioned in a document showing that the mortgagor ostensibly sold the property to the mortgagees, the expressions Kat Kobala and Saf Kobala used in a document would be sufficient to imply the purpose.

In a document the parties described it as a mortgage by conditional sale and the expression 'Kat Kobala' was used throughout the instrument. Possession was delivered over to the mortgagees and the stipulation was that they would enjoy the usufruct of the land and credit the same towards the interest due on the mortgage bond. A due date of repayment was mentioned in the document and the mortgagors promised to pay the entire mortgage debt within that time upon which the mortgaged properties would be released to them. There were further stipulations as follows:—" If we make default in paying you the principal sum on or before the due date aforesaid viz, within the month of Chaitra 1338 B. S. on expiry of the said due date you will be entitled to foreclose the mortgage and this conditional sale will thereupon ripen into an absolute sale and in that event you, your sons, grandsons and other heirs, your assigns will have title to the properties and will possess the same in great felicity and in any way you like." :

Held that the document was not an usufructuary mortgage as contemplated by section 58(d) of the Transfer of Property Act, inspite of the fact that the mortgagees were given possession of the mortgaged properties and were entitled to appropriate the rents and profits towards the intetest due.

* Civil Revision Case No. 538 of 1940, against the order of N. C. Bose, Esq., Third Subordinate Judge of 24-Parganas at Alipore, dated the 26th March, 1940.

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1940.

Mohendra Nath Sardar v. Kalipada Haldar.

Application for Revision under section 115 of the Code of Civil Procedure.

Proceeding under section 26 G(5) of the Bengal Tenancy Act.

The material facts will appear from the judgment.

Mr. Prafulla Kamal Das for the Petitioners.

Mr. Abinas Chandra Ghose for the Opposite Parties.

C. A. V.

The judgments of the Court were as follows:

June, 26.

Mukherjea, J.:—This Rule is directed against an order of the Subordinate Judge, Third Court, Alipore, dated March 26, 1940, made in a proceeding under section 26 G(5) of the Bengal Tenancy Act.

The petitioners are the mortgagees under a mortgage deed which was executed by opposite party No. 3 on behalf of herself and her two sons the opposite parties Nos. 1 and 2, who were then minors, in April, 1923.

The case of the opposite parties was that it was a usufructuary mortgage and they presented the application for restoration of the mortgaged properties under section 26 G(5) of the Bengal Tenancy Act on the ground that more than fifteen years having elapsed from the date of the registration of the instrument the consideration of the mortgage was extinguished.

The mortgagees resisted the claim substantially on two grounds: It was urged in the first place that the mortgage was one by conditional sale and not a usufructuary mortgage and as such the provisions of section 26 C(5) of the Bengal Tenancy Act were not applicable.

The second point taken was that the mortgagors having represented to the mortgagees that the properties mortgaged were *mokarari* holdings held by them at a fixed rent, they were estopped from saying that these were occupancy holdings which would attract the operation of section 26 G of the Bengal Tenancy Act.

Both the defences were negatived by the learned Subordinate Judge who allowed the application of the opposite parties for restoration of possession of the mortgaged properties. It is against this order that the present Rule has been obtained. The learned Advocate who appears for the petitioners has challenged the propriety of the decision of the trial Court on both these points.

As regards the first point it is conceded on both sides that the

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mortgage in dispute could not rank as a complete usufructuary mortgage as defined in section 3(3) of the Bengal Tenancy Act. The only question is whether it is a usufructuary mortgage at all and the document being executed prior to the commencement of the Bengal Tenancy Amendment Act of 1928, could take effect as a complete usufructuary mortgage under the provisions of sub-section 1(a) of section 26G.

In the document itself the parties described it as a mortgage by conditional sale and the expression "Kot Kobala" is used throughout the instrument. The mortgagors purported to execute the mortgage by conditional sale in respect of their share of the mortgaged properties to secure an advance of Rs. 1400 only. The possession of these properties was delivered over to the mortgagees and the stipulation was that they would enjoy the usufruct of the land and credit the same towards the interest due on the mortgage bond. The document mentions a due date which was the end of Chaitra, 1338 B.S. and the mortgagors promised to pay the entire mortgage debt within that time upon which the mortgaged properties would be released to them. Then there appears a clause which runs as follows:—

"If we make default in paying you the principal sum on or before the due date aforesaid, viz., within the month of Chaitra 1338 B.S., on expiry of the said due date you will be entitled to foreclose the mortgage and this conditional sale will thereupon ripen into an absolute sale and in that event you, your sons, grandsons and other heirs, your assigns will have title to the properties and will possess the same in great felicity and in any way you like."

Taking this document as a whole I am unable to say that this is a usufructuary mortgage as contemplated by section 58(d) of the Transfer of Property Act. It is true that the mortgagees were given possession of the mortgaged properties and they were entitled to appropriate the rents and profits towards the interest due. But the essential element of a usufructuary mortgage was wanting, namely, that the mortgagee would retain possession of the properties till the mortgage money was paid. The mere mentioning of a due date for payment is indeed not material and could be considered as a mere proviso for redemption, if the provision was that in default of redemption the mortgagees would continue to hold the property and go on enjoying the same till the mortgage money was paid.

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In the document in dispute not only is there no such term, but on the other hand the express provision is that in default of payment of the mortgage money within the due date, the mortgagee will be entitled to foreclose ; the Kot Kobala would then ripen into a Saf Kobala or an out and out sale.

In my opinion the transaction was substantially what it purported to be, namely, a mortgage by conditional sale though certain rights of a usufructuary mortgage were also given to the mortgagees. I am not impressed by the argument of Mr. Ghose that the document could not be construed as a mortgage by conditional sale, because there are no express words of transfer in the document showing that the mortgagor ostensibly sold the property to the mortgagees. The expressions Kot Kobala and Saf Kobala which are used in the document are in my opinion quite sufficient for this purpose. It is a mortgage by conditional sale of the type mentioned in the first paragraph of section 58(c) of the Transfer of Property Act where in default of payment of the mortgage money within a certain date the sale becomes absolute.

So far as the second point is concerned we are not inclined to disturb the finding of the Subordinate Judge on this point and hold that there was any estoppel to preclude the mortgagor from showing that the holdings were really occupancy holdings.

The Rule, however, must succeed on the first ground. The result is that the Rule is made absolute, the order of the Subordinate Judge is set aside and the application for restoration of the mortgaged properties made by opposite parties Nos. 1 to 3 is dismissed.

We make no order as to costs in this Rule.

Derbyshire, C. J. :—I agree.

P. R. *Rule made absolute.*

The Calcutta Law Journal.

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New Enactments.

THE BENGAL MONEY LENDERS ACT, 1940.*

[*Passed by the Bengal Legislature.*]

[Assent of the Governor-General was first published in the *Calcutta Gazette* of the 1st August, 1940]

[*An Act further to regulate transactions of money-lending in Bengal.*]

WHEREAS it is expedient to make further and better provision for the control of money-lenders and for the regulation and control of money-lending :

It is hereby enacted as follows :—

CHAPTER I.

Introductory.

Short title, extent and commencement.

1. (*1*) This Act may be called the Bengal Money-lenders Act. 1940.

(*2*) It extends to the whole of Bengal.

(*3*) It shall come into force on such date as the Provincial Government may, by notification in the *Official Gazette*, appoint.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(*1*) "bank" means a banking company as defined in section 277F of the Indian Companies Act, 1913, whether incorporated in or outside British India ; VII of 1913.

(*2*) "borrower" means a person to whom a loan is advanced and includes a successor-in-interest or surety ;

(*3*) "Calcutta" means the area within the limits of the ordinary original civil jurisdiction of the High Court in Calcutta ;

(*4*) "commercial loan" means a loan advanced to any person

* Published in the Calcutta Gazette dated 1st August, 1940, Part III p. 30.

to be used by such person solely for the purposes of any business or concern relating to trade, commerce, industry, mining, planting, insurance, transport, banking or entertainment, or to the occupation of wharfinger, warehouseman or contractor or any other venture of a mercantile nature, whether as proprietor or principal or agent or guarantor ;

Explanation.—Notwithstanding anything contained in any agreement relating thereto, a loan shall not be deemed to be a commercial loan unless it is in substance a loan to be used solely for any of the purposes referred to in this clause.

(*5*) "co-operative life insurance society," "mutual insurance company" and "provident society" have the same meaning as in the Insurance Act, 1938 ; IV of 1938.

(*6*) "co-operative society" means a society registered under the Co-operative Societies Act, 1912, or any Act of the Provincial Legislature, for the time being in force, relating to such societies ; II of 1912.

(*7*) "insurance company" means—

(*a*) in relation to any loan advanced before the commencement of the Insurance Act, 1938, an insurance company within the meaning of the Indian Insurance Companies Act, 1928, and IV of 1938. XX of 1928.

(*b*) in relation to any loan advanced after the commencement of the Insurance Act, 1938, an insurance company within the meaning of that Act ; V of 1938.

(*8*) "interest" includes any sum by whatsoever name called, in excess of the principal paid or payable to a lender in consideration of, or otherwise in respect of, a loan whether the same is charged or sought to be recovered specifically by way of interest or otherwise, but does not include any sum lawfully charged by a lender in accordance with the provisions of this Act or any other law for the time being in force for or on account of costs, charges or expenses ;

(*9*) "lender" means a person who advances a loan and includes a money-lender ;

(*10*) "licence" means a licence granted under this Act ;

(*11*) "life assurance company" has the same meaning as in the Indian Life Assurance Companies Act, 1912 ; VI of 1912.

(*12*) "loan" means an advance, whether of money or in kind, made on condition of repayment with interest and includes any transaction which is in substance a loan but does not include—

(*a*) a deposit of money or other property,

(*b*) a loan to, or by or a deposit with, any society or association

registered under the Societies Registration Act, 1860, or under any other law relating to public, religious or charitable objects ; XXI of 1860.

(*c*) a loan taken or advanced by any Government in British India or by any local authority in Bengal ;

(*d*) a loan advanced before or after the commencement of this Act—

(*i*) by a bank which was a scheduled bank on the first day of January, 1939, or by a bank which has been declared to be a notified bank under section 3, whether or not such bank was a scheduled bank or was so declared to be a notified bank, as the case may be, at the time the loan was advanced ; or

(*ii*) by a co-operative life insurance society, co-operative society, insurance company, life assurance company, mutual insurance company, provident insurance society or provident society or from a provident fund ;

(*e*) an advance made on the basis of a negotiable instrument as defined in the Negotiable Instruments Act 1881, other than a promissory note ; XXVI of 1881.

(*f*) a commercial loan ;

(*g*) a loan advanced to any person for the purchase or construction of a house or for the construction of a house together with the purchase of the site thereof, within the limits of the area defined by clause (*11*) of section 3 of the Calcutta Municipal Act, 1923, or of any area which has been or may hereafter be constituted a municipality under the provisions of the Bengal Municipal Act, 1932, if such loan is subject to the condition of repayment by instalments extending over a period of ten years or more ; Ben. Act III of 1923. Ben. Act XV of 1932.

(*h*) a loan made to or by the Administrator-General and Official Trustee of Bengal or the Commissioner of Wakfs or the Official Assignee or the Official Receiver of the High Court in Calcutta ;

(*i*) a loan or debenture in respect of which dealings are listed on any Stock Exchange ;

(*13*) "money-lender" means a person who carries on the business of money-lending in Bengal or who has a place of such business in Bengal, and includes a pawnee as defined in section 172 of the Indian Contract Act, 1872 ; IX of 1872.

(*14*) "money-lending business" and "business of money-lending" mean the business of advancing loans either solely or in conjunction with any other business ;

(*15*) "prescribed" means prescribed by rules made under this Act ;

(*16*) "principal" means in relation to a loan the amount actually advanced to the borrower ;

XIX of 1925. (*17*) "provident fund" has the same meaning as in the Provident Funds Act, 1925 ;

(*18*) "provident insurance society" means a society registered under the Provident Insurance Societies Act, 1912 ;

(*19*) "register" means a register of money-lenders maintained under section 7 ;

II of 1934. (*20*) "scheduled bank" has the same meaning as in the Reserve Bank of India Act, 1934 ;

(*21*) "suit" includes an appeal ;

(*22*) "suit to which this Act applies" means any suit or proceeding instituted or filed on or after the 1st day of January, 1939, or pending on that date and includes a proceeding in execution—

(*a*) for the recovery of a loan advanced before or after the commencement of this Act ;

(*b*) for the enforcement of any agreement entered into before or after the commencement of this Act, whether by way of settlement of account or otherwise, or of any security so taken, in respect of any loan advanced whether before or after the commencement of this Act ; or

(*c*) for the redemption of any security given before or after the commencement of this Act in respect of any loan advanced whether before or after the commencement of this Act.

Notified bank. **3.** The Provincial Government may, by notification in the *Official Gazette*, declare any bank to be a notified bank for the purposes of this Act :

Provided that no bank shall be so declared to be a notified bank unless it complies with such conditions as may, with the approval of the Provincial Legislature, be prescribed.

CHAPTER II.

Competent Courts and Procedure.

Competent Courts under this Act. **4.** Notwithstanding anything contained in any other law, the Courts (hereinafter referred to as Competent Courts) which have jurisdiction to entertain proceedings under sections 16 and 19 and to pass orders therein are the Courts hereinafter specified, within the local limits of whose jurisdiction the money-lender

actually and voluntarily resides or carries on the business of money-lending—

(*a*) in Calcutta, the Court of Small Causes of Calcutta ;

(*b*) outside Calcutta, the Court of the District Judge (hereinafter called a "District Court") and any Court to which he may transfer the proceedings.

Procedure in competent Court.

5. (*1*) Subject to the provisions of this Act, a Competent Court shall, in proceedings under section 19, have the same powers and shall follow the same procedure as it has and follows in civil suits, and the provisions of section 24 of the Code of Civil Procedure, 1908, shall apply to such proceedings. V of 1908.

(*2*) Every order made by a Competent Court under this Act shall be subject to appeal in accordance with the provisions of the Code of Civil Procedure, 1908, applicable to appeals. V of 1908.

(*3*) An appeal from a decision made by the Court of Small Causes of Calcutta under this Act shall lie to the High Court as if it were an appeal under sub-section (*2*) to the High Court from a decision made by a District Court.

CHAPTER III.

Registration and Licensing of Money-lenders.

Appointment of Provincial and other Registrars.

6. There shall be a Provincial Registrar for the purposes of this Act and as many Registrars and Sub-Registrars of money-lenders for assisting the Registrar as the Provincial Government may from time to time determine. The Provincial Government may define, by notification in the *Official Gazette*, the area within which each such officer shall exercise his powers and perform his duties and may prescribe the control which shall be exercised by the Provincial Registrar over Registrars and Sub-Registrars and by a Registrar over Sub-Registrars :

Provided that no person who is not a servant of the Crown in India shall be empowered to act as a Provincial Registrar, Registrar or Sub-Registrar under this Act.

Register of money-lenders.

7. . Each Sub-Registrar shall maintain in the prescribed form a register of money-lenders holding licences issued by him.

Money-lending business not to be carried on except under licence.

8. After such date not less than six months after the commencement of this Act as the Provincial Government shall, by notification in the *Official Gazette*, appoint in this behalf, no money-lender shall carry on the business of money-lending unless he holds an effective licence.

Explanation.—An effective licence for the purposes of this Act comprises a licence issued to a person who is not disqualified for holding a licence.

Licences.

9. (*1*) A licence shall be valid throughout the whole of Bengal for a period of three years from the date of its issue or until it is cancelled.

(*2*) On the expiration of the period for which the licence was granted or on the cancellation of a licence it shall be returned by the money-lender to the Sub-Registrar who issued it.

Licence fee.

10. There shall be paid to the Provincial Government a fee of fifteen rupees for a licence issued under this Act:

Provided that the Provincial Government may, by notification in the *Official Gazette*, remit any part of such fee either generally or for any particular class of money-lenders.

Application for licences.

11. An application for the grant of a licence shall be made in the prescribed form and manner to the Sub-Registrar within the local limits of whose jurisdiction the money-lender has a place of money-lending business and shall contain such particulars as may be prescribed.

Entry in Register and grant of licences.

12. On receipt of an application under section 11 and on payment in the prescribed manner of the licence fee specified in section 10, the Sub-Registrar shall, subject to the provisions of section 16, enter the name of the applicant in the register and grant the applicant a licence in such form as may be prescribed.

Stay of suit when money-lender does not hold licence

13. (*1*) No Court shall pass a decree or order in favour of a money-lender in any suit instituted by a money-lender for the recovery of a loan advanced after the date notified under section 8, or in any suit instituted by a money-lender for the enforcement of an agreement entered into or security taken, or for the recovery of any security given, in respect of such loan, unless the Court is satisfied that, at the time or times when the loan or any part thereof was advanced, the money-lender held an effective licence.

(*2*) If during the trial of a suit to which sub-section (*1*) applies, the Court finds that the money-lender did not hold such licence, the Court shall, before proceeding with the suit, require the money-lender to pay in the prescribed manner and within the period to be fixed by the Court such penalty as the Court thinks fit, not exceeding three times the amount of the licence fee specified in section 10.

(*3*) If the money-lender fails to pay the penalty within the period fixed under sub-section (*2*) or within such further

time as the Court may allow, the Court shall dismiss the suit: if the money-lender pays the penalty within such period, the Court shall proceed with the suit.

(4) The provisions of this section shall apply to a claim for a set-off by or on behalf of a money-lender.

(5) In this section, the expression "money-lender" includes an assignee of a money-lender, if the Court is satisfied that the assignment was made for the purposes of avoiding the payment of licence fee and penalty which may be ordered to be paid under this section.

Disqualification of persons for holding a licence.

14. *(1)* A person shall be disqualified for holding a licence—

(a) if so ordered by a Court under section 20, for the period ordered;

(b) if he has been convicted of any offence specified in the Schedule to this Act and if such conviction has not been set aside by any Court of appeal or revision under any law for the time being in force.

(2) The Provincial Government may, at any time, on application in the prescribed form accompanied by the prescribed fee, remove a disqualification referred to in sub-section *(1)*, having regard to the time which has elapsed since the order and the circumstances under which it was made or to the time which has elapsed since the conviction and to the nature of the offence.

Proof of conviction or order for disqualification.

15. Where it is required to be proved for the purposes of this Act that any person has been convicted of an offence specified in the Schedule to this Act or has been disqualified by an order of a Court for holding a licence, such conviction or order may be proved, in addition to any other mode provided by any law for the time being in force—

(a) by an extract certified under the signature of the officer having the custody of the records of the Court in which such conviction was had, or such order was passed, to be a copy of the sentence or order, or

(b) in the case of a conviction, by a certificate signed by the officer in charge of the jail, in which the punishment or any part thereof was undergone, or by the production of the warrant of commitment under which the punishment was suffered,

together with, in each of such cases, evidence as to the identity of the person so convicted or in respect of whom such order was passed.

Refusal to grant licence.

16. *(1)* The grant of a licence shall not be refused except on one or more of the following grounds, namely :—

(*a*) that the applicant has not complied with the provisions of this Act or of the rules made thereunder in respect of an application for the grant of a licence ;

(*b*) that the applicant or any person responsible or proposed to be responsible for the management of the applicant's money-lending business is under this Act disqualified for holding a licence.

(*2*) A Sub-Registrar refusing a licence—

(*i*) under clause (*a*) of sub-section (*1*) shall record his reasons for such refusal ;

(*ii*) under clause (*b*) of sub-section (*1*) shall record the evidence of the disqualification.

(*3*) An appeal from the orders of a Sub-Registrar refusing a licence, shall, if made within thirty days from the date of such order, lie to a Registrar authorised under section 6 to hear such appeal.

(*4*) A Registrar referred to in sub-section (*3*) may decide, if such appeal is allowed, as to the Sub-Registrar to whom application for a licence shall be made and his decision shall, subject to the provisions of sub-section (*5*), be final for all purposes, and shall be binding on such Sub-Registrar whether he be under the control of such Registrar or not.

(*5*) A Competent Court may, on application made within ninety days from the date of the decision of the Registrar in appeal under sub-section (*3*), revise such decision.

(*6*) The procedure to be followed by a Competent Court or by a Registrar in proceedings under this section shall be in accordance with rules prescribed under this Act.

(*7*) The provisions of sections 4, 5 and 12 of the Indian Limitation Act, 1908, shall apply to all appeals and applications for revision made under this section, and for the purposes of the said sections a Registrar shall be deemed to be a Court. IX of 1908.

Cancellation of licence by a Sub-Registrar

17. Any Sub-Registrar may, after giving the money-lender to whom a licence entered in the register maintained by such Sub-Registrar was issued an opportunity of being heard, cancel the licence if it is proved that such money-lender was disqualified for holding a licence at the time when such licence was issued ; and thereupon the provisions of clause (*ii*) of sub-section (*2*) and of sub-sections (*3*), (*4*), (*5*), (*6*) and (*7*) of section 16 shall apply.

Power to Registrar and Sub-Registrar to examine any

18. For the purposes of an inquiry under this Act relating to a disqualification for holding a licence a Registrar or a Sub-Registrar shall have and may exercise the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908, in respect V of 1908.

of enforcing the attendance of any person and examining him on oath.

person on oath.

19. Any borrower may, in respect of any money-lender from whom he has taken a loan, make an application to a Competent Court for an order under section 20 on the ground that such money-lender has committed such contravention of the provisions of this Act or the rules made thereunder as render him unfit to carry on the business of money-lending, and on receipt of such application, the said Court shall hold such inquiry as it deems necessary.

Application for cancellation of licence.

20. (1) A Competent Court on an application under section 19 or a Court trying a suit to which this Act applies or a Court passing an order of conviction upon a money-lender for an offence under this Act, if satisfied that the money-lender has committed such contravention of the provisions of this Act or of the rules made thereunder as, in its opinion, makes him unfit to carry on the business of money-lending—

Court's power to cancel a licence.

(a) shall cause the particulars of the conviction, if any, and of any order passed by the Court under this sub-section to be endorsed on the licence held by the money-lender or by any other person affected by such order; and

(b) may declare such money-lender or any person responsible for the management of his money-lending business or both disqualified for holding a licence for such period as the Court may think fit and shall cancel and impound the licence held by the money-lender:

Provided that, except in the case of an order passed by a District Court, or by the Court of an Additional District Judge or by the Court of Small Causes of Calcutta, the period of disqualification shall not exceed one year.

(2) If a Court other than a District Court, or the Court of an Additional District Judge or the Court of Small Causes of Calcutta is of opinion that a period of disqualification exceeding one year should be imposed, it shall record its opinion and forward the proceedings to the District Court having jurisdiction in the place where such Court is held.

(3) The District Court to which such proceedings are submitted may, if it thinks fit, examine the parties and recall and examine any person who has already given evidence in the proceedings, and may call for and take any further evidence, and shall pass such order in the case as it thinks fit in accordance with the provisions of sub-section (1).

(4) Any person aggrieved by the decision of a Court under this

section may appeal against such order, in the case of the Court of Small Causes of Calcutta to the High Court and in the case of any other Court to the Court to which an appeal ordinarily lies from the decision of the Court passing the order; and the Court which passed the order or the Court of appeal may, if it thinks fit, stay the operation of the order under this section pending the disposal of the appeal:

Provided that where the Court of appeal sets aside or varies an order passed under this section, it shall order that any endorsements made in pursuance thereof upon a licence held by a money-lender shall be erased or modified.

(*5*) The substance of any order passed under sub-section (*1*), sub-section (*3*) or sub-section (*4*) shall be sent forthwith in the prescribed form by the Court passing the order to the Provincial Registrar and also together with the cancelled licence to the Sub-Registrar who maintains the register in which the licence affected has been entered for entry in the said register and for such circulation of the substance of the said order to other Registrars as may be prescribed.

(*6*) Any licence required by a Court for endorsement under sub-section (*1*) shall be produced in such manner and at such time as the Court may direct by the person by whom it is held, and any person who without reasonable cause makes default herein shall be liable on conviction to a fine not exceeding five rupees for each day of the period during which the default continues.

(*7*) The powers conferred on a Court under sub-section (*1*) may be exercised by a Court in appeal or in revision.

No compensation for cancellation of licence.

21. A person whose licence has been cancelled shall not be entitled to any compensation on such account nor to the refund of any licence fee paid in respect of such licence.

Licence fees and penalties recoverable as public demands.

22. All licence fees and all penalties imposed under this Act shall be recoverable as public demands.

Offences in respect of licences

23. (*1*) Whoever being disqualified for holding a licence, applies for or obtains a licence during the pendency of such disqualification, without disclosing the fact thereof, shall be punishable, on conviction, with imprisonment which may extend to three months or with fine which may extend to five hundred rupees or with both, and any licence so obtained shall not be deemed to be an effective licence.

(*2*) Whoever obliterates or causes to be obliterated or attempts

to obliterate an endorsement entered on a licence under this Act or abets such obliteration or attempt shall be punishable, on conviction, with imprisonment which may extend to three months or with fine which may extend to five hundred rupees or with both.

CHAPTER IV.

Regulation of Accounts of Money-lenders.

Duty of money-lender to keep accounts.

24. (*1*) Every money-lender shall keep and maintain at least a cash book, a ledger and a receipt book in such form or forms as may be prescribed, and the same shall be written in Bengali or English in the regular course of business.

(*2*) Every money-lender shall—

(*a*) deliver to the borrower at the time a loan is advanced a statement in Bengali or English as the borrower may desire, in such form as may be prescribed and showing such details of the conditions of the loan and such other information connected therewith as may be prescribed ;

(*b*) give to the borrower a plain and complete receipt for every payment made on account of any loan at the time of such payment ;

(*c*) upon repayment in full of a loan mark indelibly with words indicating full payment or cancellation every paper signed by the borrower, and discharge any mortgage, restore any pledge, return any note and cancel any assignment given by the borrower as security.

(*3*) Notwithstanding anything contained in the Indian Evidence Act, 1872, a copy of the account referred to in sub-section (*1*) shall, if certified in such manner as may be prescribed, be admissible as evidence of the contents of such account. I of 1872.

Money-lenders to furnish statements of accounts.

25. (*1*) Every money-lender shall, within two months of the commencement of each year, furnish each of his borrowers with a legible statement of accounts in Bengali or English as the borrower may desire signed by the money-lender or his agent and showing the amount outstanding against the borrower : such statement shall be in the prescribed form and shall show—

(*a*) the amounts of principal and interest due to the money-lender at the commencement of the year ;

(*b*) the amounts of any sums advanced to the borrower from

time to time since the commencement of the year and the dates on which they were advanced ;

(*c*) the amounts of any payments received from the borrower since the commencement of the year in respect of loans outstanding and the dates on which they were received ;

(*d*) the amount of every sum due from the borrower remaining unpaid and the date on which each such sum became due and the amount of interest accrued due and unpaid in respect of every such sum ;

(*e*) the amount of every sum not yet due which remains outstanding and the date upon which each such sum will become due ; and

(*f*) such other particulars as may be prescribed.

(*2*) In respect of any particular loan, whether advanced before or after the commencement of this Act, a money-lender shall, on demand being made in writing by the borrower at any time while the loan or any portion thereof remains outstanding, supply to the borrower or to any person specified in that behalf in the demand, within thirty days from the date of receipt of the written demand by the money-lender or his duly authorised agent, a statement in Bengali or English as the borrower may desire, signed by the money-lender or his agent and showing in the prescribed form any or all of the particulars specified in sub-section (*1*) :

Provided that the money-lender shall not be bound to comply with such demand if he has complied with a demand made not more than six months prior to the date thereof, or if within such period of six months he has furnished the statement required by sub-section (*1*).

(*3*) A money-lender shall, on a demand in writing by the borrower, supply to the borrower or to any person specified in that behalf in the demand a copy of any document evidencing an agreement to secure repayment of a loan advanced to the borrower :

Provided that a money-lender shall not be bound to comply with such a demand if he has previously furnished the borrower with such copy, except on payment of such fee as may be prescribed.

(*4*) In this section the expression "year" means the year for which the accounts of the money-lender are ordinarily maintained in his own books.

26. A borrower to whom a statement of accounts has been furnished under section 25 shall not be bound to acknowledge or deny its correctness, and his failure to do so shall not, by itself, be deemed to be an admission of the correctness of the account.

Borrower not bound by money-lender's statement of accounts.

27. Notwithstanding anything contained in any law for the time being in force, in any suit to which this Act applies—

Procedure in suits relating to loans by money lenders

(*a*) a Court shall, before deciding the claim on its merits, frame and decide the issue whether the money-lender has in respect of the claim in suit complied with the provisions of sections 24 and 25; and

(*b*) if the Court finds that the provisions of either of the said sections have not been so complied with, it may, if the plaintiff's claim is established either wholly or in part, disallow the whole or such portion of the interest found due as may, in the circumstances of the case, appear reasonable to the Court, and may also disallow costs, or in computing the amount of interest due upon the loan, the Court may exclude any period for which the money-lender omitted to comply with the provisions of either of the said sections:

Provided that if the money-lender has, after the time specified in the said sections, given the receipt or furnished the statement, as the case may be, and if he satisfies the Court that he had sufficient cause for not doing so earlier, the Court may include any such period in computing the interest.

Explanation.—A money-lender who has given a receipt or furnished a statement in the prescribed form shall be held to have complied with the provisions of section 24 or section 25, as the case may be, in spite of any errors and omissions in such receipt or statement, if the Court finds that such errors and omissions are neither material nor made fraudulently.

CHAPRER V.

Assignment of loans.

28. (*1*) Where any debt in respect of—

Notice and information to be given on assignment of loans by lenders.

(*i*) a loan advanced by a lender, whether before or after the commencement of this Act, or

(*ii*) interest on any such debt, or

(*iii*) the benefit of any agreement made, or security taken, in respect of any such debt or interest,

is assigned to any person, the assignor (whether he is the lender by whom the loan was advanced or any person to whom the debt has been previously assigned) shall, before the assignment is made,—

(*a*) give to the assignee notice in writing that the debt, interest thereon, agreement or security is affected by the operation of this Act, and

(*b*) where the debt is in respect of a loan advanced by a money-lender, supply to the assignee in such form as may be prescribed all information as to the state of the loan together with copies of documents relating thereto.

(*2*) Any person who acts in contravention of any of the provisions of this section shall be liable to indemnify any other person who is prejudiced by the contravention, and shall also be punishable, on conviction, with imprisonment which may extend to one year or with fine which may extend to one thousand rupees or with both.

(*3*) In this section the expression "assigned" means assigned by an assignment *inter vivos* other than an assignment by operation of law; and the expressions "assignor" and "assignee" have corresponding meanings.

Application of Act as respects assignees.

29. (*1*) Subject as hereinafter provided, the provisions of this Act shall continue to apply as respects any debt due to a lender or money-lender in respect of loans advanced by him after the commencement of this Act or in respect of interest on such loans or of the benefit of any agreement made or security taken in respect of any such debt or interest, notwithstanding that the debt or the benefit of the agreement or security may have been assigned to any assignee, and except where the context otherwise requires, references in this Act to a lender or money-lender shall accordingly be construed as including any such assignee as aforesaid :

Provided that, notwithstanding anything contained in this Act—

(*a*) any agreement with, or security taken by, a lender or money-lender in respect of a loan advanced by him after the commencement of this Act shall be valid in favour of any *bona fide* assignee or holder for value without notice of any defect due to the operation of this Act and of any person deriving title under him; and

(b) any payment or transfer of money or property made *bona fide* by any person, whether acting in a fiduciary capacity or otherwise on the faith of the validity of any such agreement or security, without notice of any such defect shall, in favour of that person, be as valid as it would have been if the agreement or security had been valid ;

but in every such case the lender or money-lender shall be liable to indemnify the borrower or any other person who is prejudiced by virtue of this section, and nothing in this proviso shall render valid an agreement or security in favour of, or apply to proceedings instituted by, an assignee or holder for value who is himself a money-lender.

(2) The provisions of this Act shall apply and be deemed always to have applied and shall continue to apply as respects any debt due to a lender or money-lender in respect of loans advanced by him before the commencement of this Act or in respect of interest on such loans or of the benefit of any agreement made or security taken in respect of any such debt or interest, notwithstanding that the debt or the benefit of the agreement or security may have been assigned to any sssignee, and except where the context otherwise requires, references in this Act to a lender or money-lender shall accordingly be construed as including any such assignee as aforesaid.

(3) Nothing in this section shall render valid for any purpose any agreement, security or other transaction which would, apart from the provisions of this Act, have been void or unenforceable.

CHAPTER VI.

Interest and other charges.

Limitation as to amount and rate or interest recoverable.

30. Notwithstanding anything contained in any law for the time being in force, or in any agreement,

(1) no borrower shall be liable to pay after the commencement of this Act—

(a) any sum in respect of principal and interest which together with any amount already paid or included in any decree in respect of a loan exceeds twice the principal of the original loan,

(b) on account of interest outstanding on the date up to which such liability is computed, a sum greater than principal outstanding on such date,

(*c*) interest at a rate *per annum* exceeding in the case of—

(*i*) unsecured loans, ten *per centum* simple,

(*ii*) secured loans, eight *per centum* simple,

whether such loan was advanced or such amount was paid or such decree was passed or such interest accrued before or after the commencement of this Act;

(*2*) no borrower shall after the commencement of this Act, be deemed to have been liable to pay before the date of such commencement in respect of interest paid before such date or included in a decree passed before such date, interest at rates *per annum* exceeding those specified in sub-clause (*c*) of clause (*1*);

(*3*) a lender shall be entitled to institute a suit at any time after the commencement of this Act in respect of a transaction to which either or both of the preceding clauses applies or apply.

Prohibition of interest on decretal amount.

31. Notwithstanding anything contained in any law for the time being in force, no Court shall, in any decree passed in any suit to which this Act applies—

(*a*) if the loan to which the decree relates was advanced before the commencement of this Act, allow any interest on the decretal amount, or

(*b*) if the loan to which the decree relates was advanced after the commencement of this Act, allow any interest other than interest not exceeding six *per centum per annum* on the principal sum adjudged.

Computation of interest on loans in kind.

32. In the case of loans in kind, the money value of the commodity at the time when, and in the locality where, the loan was advanced shall, for the purposes of this Act, be deemed to be the principal of the loan, and in determining the amount which may, subject to the provisions of this chapter, be decreed in respect of any loan repayable in kind, the Court shall take into consideration the market value of the commodity in the said locality at the date or dates of repayment.

Prohibition of charges for expenses on loans.

33. Any agreement between a lender and a borrower or intending borrower for the payment to the lender of any sum on account of costs, charges or expenses incidental or relating to the negotiations for, or the granting of, the loan or proposed loan, shall be illegal, and if any sum is paid to a lender by the borrower or intending borrower as, for or on account of any such costs, charges or expenses, that sum shall be recoverable as a debt due to the borrower or intending borrower, or in the event of the loan being completed, shall, if not so recovered, be set off against the

amount actually lent and that amount shall be deemed to be reduced accordingly :

Provided that nothing in this section shall debar a lender from recovering the costs of investigating title, of stamp duty and registration of documents and other necessary and incidental expenses in cases where the agreement includes a stipulation that property is to be given as security or by way of mortgage, or the costs of stamp duty and registration of documents in the case of unsecured loans, if both parties have agreed to such expenditure and the reimbursement thereof, nor from recovering such costs, charges or expenses as are leviable under the provisions of the Transfer of Property Act, 1882, or any other law for the time being in force. IV of 1882.

CHAPTER VII.

Miscellaneous.

Power of Court to direct payment by instalments.

34. (*1*) Notwithstanding anything contained in any law for the time being in force, or in any agreement, the Court shall—

(*a*) in suits in respect of loans to which the provisions of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, apply, on the application of the defendant and after hearing the plaintiff, notwithstanding the limit of six months provided therein, direct at the time of the passing of the preliminary decree under rule 2 or rule 4 of the said Order to the effect mentioned in sub-clause (*i*) of clause (*c*) of sub-rule (*1*) of the said rule 2,— V of 1908.

(*i*) that the payment of the amount found or declared due under sub-rule (*1*) of rule 2 or sub-rule (*1*) of rule 4 of the said Order, as the case may be, is to be made, subject to such conditions as the Court may impose in such number of annual instalments and on such dates as the Court thinks fit having regard to the circumstances of the plaintiff and the defendant and the amount of the decree ; and

(*ii*) that in default of payment of any such instalment the plaintiff shall, after giving to the defendant such notice as may be prescribed, be entitled to apply for a final decree under sub-clause (*ii*) of clause (*c*) of sub-rule (*1*) of the said rule 2 or under sub-rule (*1*) of the said rule 4, as the case may be, and the date of such default shall be deemed to be the date fixed under sub-clause (*i*) of clause (*c*) of sub-rule (*1*) of the said rule 2 for payment of the whole amount found or declared due under or by the preliminary decree ;

Provided that nothing in this clause shall affect the power of the Court to allow extension of time under sub-rule (2) of rule 2 or sub-rule (2) of rule 4 of the said Order:

Provided further that if the defendant, after receiving the notice referred to in sub-clause (*ii*) and before a final decree is passed, makes payment into Court of the amount due from him in respect of any such instalment, the payment of such instalment shall not be deemed to be in default and the Court shall not pass a final decree;

(*b*) in suits in respect of loans advanced before the commencement of this Act other than those referred to in clause (*a*)—

(*i*) on the application of a defendant and after hearing the plaintiff, order at the time of the passing of the decree, or

(*ii*) on the application of a judgment-debtor against whom a decree in such suit has been passed whether before or after the commencement of this Act and after notice to the decree-holder, order at any time after the decree has been passed,

that the amount of the decree shall, subject to such conditions as the Court may impose, be payable without interest in such number of annual instalments, on such dates and within such period not exceeding twenty years as the Court thinks fit having regard to the circumstances of the plaintiff and the defendant or the decree-holder and the judgment-debtor and the amount of the decree, and that, if default is made in making payment of any instalment, that instalment and not the whole of the decretal amount shall be recoverable;

(*c*) during the pendency of any enquiry under sub-clause (*ii*) of clause (*b*) order, subject to such conditions as the Court may impose, the stay of execution of the decree.

(2) In default of payment of any instalment referred to in clause (*b*) of sub-section (*1*), the decree-holder shall, after giving to the judgment-debtor such notice as may be prescribed, be entitled to apply for execution of the decree in respect of such instalment together with interest thereon at the rate of not more than six *per centum per annum* from the date of such default:

Provided that nothing in this subsection shall affect the power of the Court to allow, prior to an order for execution of the decree, an extension of time of not less than one year for the payment of any instalment, and that if such extension of time is allowed, the payment of such instalment shall not be deemed to be in default:

Provided further that if the judgment-debtor, after receiving the notice referred to in this sub-section and prior to an order for

execution of the decree, makes payment into Court of the amount due from him in respect of any such instalment, the payment of such instalment shall not be deemed to be in default and the Court shall not order execution of the decree.

(3) Any order made under sub-clause (*ii*) of clause (*b*) of sub-section (*1*) shall be deemed to have been passed under section 47 of the Code of Civil Procedure, 1908. V of 1908.

Sale of property in execution of decrees in respect of loans.

35. Notwithstanding anything contained in any other law for the time being in force, the proclamation of the intended sale of property in execution of a decree passed in respect of a loan shall specify only so much of the property of the judgment-debtor as the Court considers to be saleable at a price sufficient to satisfy the decree, and the property so specified shall not be sold at a price which is less than the price specified in such proclamation:

Provided that, if the highest amount bid for the property so specified is less than the price so specified, the Court may sell such property for such amount, if the decree-holder consents in writing to forego so much of the amount decreed as is equal to the difference between the highest amount bid and the price so specified.

Reopening of transactions.

36. (*1*) Notwithstanding anything contained in any law for the time being in force, if in any suit to which this Act applies, or in any suit brought by a borrower for relief under this section whether heard *ex parte* or otherwise, the Court has reason to believe that the exercise of one or more of the powers under this section will give relief to the borrower, it shall exercise all or any of the following powers as it may consider appropriate, namely, shall—

(*a*) reopen any transaction and take an account between the parties;

(*b*) notwithstanding any agreement, purporting to close previous dealings and to create new obligations, reopen any account already taken between the parties;

(*c*) release the borrower of all liability in excess of the limits specified in clauses (*1*) and (*2*) of section 30;

(*d*) if anything has been paid or allowed in account on or after the first day of January, 1939, in respect of the liability referred to in clause (*c*), order the lender to repay any sum which the Court considers to be repayable in respect of such payment or allowance in account as aforesaid:

Provided that in the case of a loan to which the provisions of sub-section (*2*) of section 29 apply the lender or money-lender

and each of his assignees shall be liable to repay the sum which the Court considers to be repayable in respect of and in proportion to the sum received by such lender or money-lender and such assignee ;

(*e*) set aside either wholly or in part or revise or alter any security given or agreement made in respect of any loan, and if the lender has parted with the security, order him to indemnify the borrower in such manner and to such extent as it may deem just :

Provided that in the exeraise of these powers the Court shall not—

(*i*) reopen any adjustment or agreement, purporting to close previous dealings and to create new obligations, which has been entered into at a date more than twelve years prior to the date of the suit by the parties or any person through whom they claim, or

(*ii*) do anything which affects any decree of a Court, other than a decree in a suit to which this Act applies which was not fully satisfied by the first day of January, 1939, or anything which affects an award made under the Bengal Agricultural Debtors Act, 1935.

Ben. Act VII of 1836.

Explanation.—A decree shall not, for the purposes of this section, be deemed to have been fully satisfied so long as there remains undisposed of an application by the decree-holder for possession of property purchased by him in execution of the decree.

(*2*) If in exercise of the powers conferred by sub-section (*1*) the Court reopens a decree, the Court—

(*a*) shall, after affording the parties an opportunity of being heard, pass a new decree in accordance with the provisions of this Act, and may award to the decree-holder such costs in respect of the reopened decree as it thinks fit,

(*b*) shall not do anything which affects any right acquired *bona fide* by any person, other than the decree-holder, in consequence of the execution of the reopened decree,

(*c*) shall order the restoration to the judgment-debtor of such property, if any, of the judgment-debtor acquired by the decree-holder in consequence of the execution of the reopened decree as may be in the possession of the decree-holder on the date on which the decree was reopened,

(*d*) shall order the judgment-debtor to pay to the decree-holder, in such number of instalments as it may think fit, the whole amount of the new decree passed under clause (*a*), and

(*e*) shall direct that, in default of the payment of any instalment ordered under clause (*d*), the decree-holder shall be put into possession of the property referred to in clause (*c*) and that the amount for which the decree-holder purchased such property in execution of the reopened decree shall be set off against so much of the amount of the new decree as remains unsatisfied.

(*3*) In this section the expression "suit to which this Act applies" includes a proceeding in respect of any application relating to the admission or amount of a proof of a loan advanced before or after commencement of this Act in any insolvency proceedings.

(*4*) This section shall apply to any suit, whatever its form may be, if such suit is substantially one for the recovery of a loan or for the enforcement of any agreement or security in respect of a loan or for the redemption of any such security.

(*5*) Nothing in this section shall affect the rights of any assignee or holder for value if the Court is satisfied that the assignment to him was *bona fide*, and that he had not received the notice referred to in clause (*a*) of sub-section (*1*) of section 28.

(*6*) Notwithstanding anything contained in any law for the time being in force,—

(*a*) the Court which, in a suit to which this Act applies, passed a decree which was not fully satisfied by the first day of January, 1939, may exercise the powers conferred by sub-sections (*1*) and (*2*)—

(*i*) in any proceedings in execution of such decree, or

(*ii*) on an application for review of such decree made within one year of the date of commencement of this Act, and the provisions of rules 2 and 5 of Order XLVII of the First Schedule to the Code of Civil Procedure, 1908, shall not apply to any such application;

(*b*) any Court before which an appeal is pending in respect of a decree referred to in clause (*a*) may either itself exercise the like powers as may be exercised under sub-sections (*1*) and (*2*), or refer the case to the Court which passed the decree directing such Court to exercise such powers, and such Court shall after exercise thereof return the record with the additional evidence, if any, taken by it and its findings and the reasons therefor to the Appellate Court and thereupon the provisions of rule 26 of Order XLI of the First Schedule to the Code of Civil Procedure, 1908, shall apply. V of 1908.

Prohibition of execution of decrees by arrest and detention in prison.

37. Notwithstanding anything contained in any law for the time being in force, no Court shall order execution of a decree passed in any suit to which this Act applies by arrest and detention in prison of the judgment-debtor

Inquiry for taking accounts and declaring the amount due.

38. (*1*) Any borrower may make an application at any time to a Court which would have jurisdiction to entertain a suit by the lender for the recovery of the principal and interest of a loan made before or after the commencement of this Act for taking accounts and for declaring the amount due to the lender. Such application shall be in the prescribed form and shall be accompanied by a fee of one rupee, and on receipt of such application the Court shall cause a notice thereof to be served on the lender.

(*2*) The Court shall thereafter take an account of the transactions between the parties and shall declare the amounts, if any,—

(*a*) payable and already due,

(*b*) payable but not yet due

by the borrower to the lender, whether as principal or interest or both. In taking accounts under this section the Court shall follow the same procedure as it does in regard to civil suits and, so far as may be, the provisions of Chapters IV, VI and VII.

(*3*) A proceeding under this section shall be deemed to be a suit for the purposes of section 11 of the Code of Civil Procedure, 1908, and a declaration under this section shall be subject to appeal, if any, as if it were a decree of the Court, and every decision in appeal shall be subject to appeal to the High Court in the same manner as a decree passed in appeal.

V of 1908.

Deposit in Court of money due to lender.

39. (*1*) Where any sum of money has been declared under sub-section *2* of section 38 to be payable by the borrower to the lender as principal or interest or both, or where a borrower has sent to a lender by postal money order any sum of money due from him to the lender in respect of a loan and the lender has refused to accept the same, the borrower may apply in the prescribed manner to the Civil Court of the lowest grade having jurisdiction over the place where he resides for permission to deposit the said sum in Court to the account of the lender, and the Court shall keep the said sum in deposit.

(*2*) The Court shall thereupon cause notice of the deposit to be served on the lender, and the lender may on presenting a petition, verified as for a plaint and stating the sum then due in respect of the loan and his willingness to accept the money so deposited, receive the sum :

Provided that in accepting any sum deposited under this section a lender shall not be bound by any statement made by the borrower in depositing the same :

Provided also that, if the Court is satisfied that the lender has,

without reasonable excuse, refused to accept any sum sent to him by postal money order by the borrower in respect of the loan, it may direct the payment to the borrower, from the money so deposited or otherwise, of such sum as damages and costs as it thinks fit.

(3) Notwithstanding any agreement between the parties, when the borrower has deposited in Court under this section any sum due in respect of the loan, if such sum is in payment of the principal or any part thereof, the interest on such principal or part shall cease from the date of the service of notice on the lender under sub-section (2).

(4) Nothing in this section shall affect the operation of sections 83 and 84 of the Transfer of Property Act, 1882, in regard to loans to which those sections apply. IV of 1882.

Entry of an amount in a bond, etc., different to the amount actually lent to be an offence.

40. (1) No lender shall take from a borrower or intending borrower any note, promise to pay, power of attorney, bond or security which does not state the actual amount of the loan, the rate of interest charged and the time, if any, within which the principal is stipulated to be repaid in full, or which states any of such particulars incorrectly, nor shall he take from any borrower or intending borrower any instrument in which any entry is left blank for completion at a later date.

(2) Whoever intentionally contravenes the provisions of sub-section (1) shall, on conviction, be punishable with simple imprisonment which may extend to six months or with fine which may extend to one thousand rupees or with both.

(3) No money-lender shall take from any borrower or intending borrower any note, promise to pay, power of attorney, bond or security which describes or refers to as a commercial loan any loan which is not a commercial loan.

(4) Notwithstanding anything contained in any law for the time being in force, any note, promise to pay, power of attorney, bond, security or document referred to in sub-section (1) or sub-section (3) shall be void and unenforceable.

(5) Notwithstanding anything contained in any law for the time being in force, in any suit, or proceeding the burden of proving that a loan is a commercial loan shall be on the money-lender who advanced the loan.

Penalty for molestation.

41. (1) Whoever molests, or abets the molestation of, a debtor for the purpose of recovering or attempting to recover, a debt shall be punishable, on conviction, with imprisonment which may extend to one year or with fine which may extend to one thousand rupees or with both.

Explanation.—For the purposes of this section, a person who, with intent to cause another person to abstain from doing any act which he has a right to do or to do any act which he has a right to abstain from doing,—

(*a*) obstructs or uses violence to or intimidates such other person, or

(*b*) persistently follows such other person from place to place or interferes with any property owned or used by him or deprives him of, or hinders him in the use thereof, or

(*c*) loiters or does any similar act at or near a house, building or place where such other person resides or works or receives his pay or wages or carries on business or happens to be—

shall be deemed to molest such other person:

Provided that a person who attends at or near such house, building or place for the purpose only of making a formal demand for repayment of a loan due or of obtaining or communicating information shall not be deemed to molest.

V of 1898.

(*2*) Notwithstanding anything contained in the Code of Criminal Procedure, 1898, an offence under this section shall be cognisable and bailable.

Ben. Act IV of 1935.

(*3*) Nothing in this section shall be deemed to restrict the provisions of the Bengal Workmen's Protection Act, 1934.

General provisions regarding penalties.

42. (*1*) When any money-lender or any servant or agent of, or any person responsible for the management of the money-lending business of, a money-lender knowingly and wilfully commits, authorises or permits any default in complying with, or any contravention of, any provision of this Act, if the money-lender or such servant, agent or person is—

(*a*) an individual, such individual, or

(*b*) an undivided Hindu joint family, any member of such family who is knowingly and wilfully a party to such default or contravention, or

(*c*) a body corporate, any director or officer of such body who is knowingly and wilfully a party to such default or contravention, or

(*d*) an unincorporated body, any member of such body who is knowingly and wilfully a party to such default or contravention,

shall, where a specific penalty has been provided in this Act, be punishable under the provisions of this Act providing such penalty, and where no such specific penalty has been provided, be punishable on conviction—

(*i*) for the first offence, with fine which may extend to two hundred rupees,

(*ii*) for the second offence, with fine which may extend to five hundred rupees, and

(*iii*) for any subsequent offence, with rigorous imprisonment which may extend to three months and shall also be liable to fine.

(*2*) No Court shall take cognizance of an offence punishable under sub-section (*1*) except on the complaint in writing of the Provincial Registrar or a Registrar or of a person authorised in this behalf by the Provincial Registrar or a Registrar.

(*3*) The Provincial Registrar may order the withdrawal of a complaint made under sub-section (*2*), and, if he does so, shall forward a copy of such order to the Court, and upon receipt thereof by the Court, no further proceedings shall be taken on the complaint.

(4) No Court inferior to that of a Presidency Magistrate or a Subdivisional Magistrate or a Magistrate of the first class shall try an offence punishable under sub-section (*1*).

Protection to persons acting under this Act.

43. No suit, prosecution or proceeding shall lie against any servant of the Crown in India for anything which is in good faith done or intended to be done under this Act.

Power to make rules.

44. (*1*) The Provincial Government may, subject to the condition of previous publication, make rules for carrying out the purposes of this Act.

(*2*) In particular and without prejudice to the generality of the foregoing power, such rules may provide for the following matters, namely :—

(*a*) the conditions referred to in the proviso to section 3 ;

(*b*) the control to be exercised by the Provincial Registrar over Registrars and Sub-Registrars and by a Registrar over Sub-Registrars ;

(*c*) the form in which registers under section 7 shall be maintained ;

(*d*) the form and manner in which an application for the grant of a licence shall be made, and the particulars to be therein contained ;

(*e*) the manner in which licence fees and penalties shall be paid ;

(*f*) the form of licences ;

(*g*) the form of, and the fee payable on, an application under sub-section (*2*) of section 14 ;

(*h*) the procedure to be followed by a Competent Court or by a Registrar in proceedings under section 16 ;

(*i*) the form in which a Court shall send the substance of the order referred to in Sub-section (*5*) of section 20, and the method of circulation of the same to other Registrars ;

(*j*) the form in which a money-lender shall maintain his cash book, ledger and receipt book ;

(*k*) the form of, and the particulars to be contained in, the statement to be delivered under sub-section (*2*) of section 24 ;

(*l*) the form of the statements to be furnished under section 25 and the fee to be paid under the proviso to sub-section (*3*) of that section ;

(*m*) the form in which information shall be supplied to an assignee under clause (*b*) of sub-section (*1*) of section 28 ;

(*n*) the form in which notice shall be given by the plaintiff to the defendant under sub-clause (*ii*) of clause (*a*) of sub-section (*1*) of section 34, and by the decree-holder to the judgment-debtor under sub-section (*2*) of that section ;

(*o*) the form of an application under section 38 ; and

(*p*) the manner in which an application under section 39 shall be made.

Ben. Act VII of 1933 not to apply to loans to which this Act applies.

45. The Bengal Money-lenders Act, 1933, shall not apply to any loan to which this Act applies nor to any transaction connected with such loan.

THE SCHEDULE.

[*See* sections 14 (*1*) (*b*) and 15.]

Any offence punishable under any of the following sections of the Indian Penal Code, namely, sections 379 to 382, 384 to 389, 392 to 404, 406 to 409, 411 to 414, 417 to 424, 449, 450, 451 (with intent to commit theft), 454 (with intent to commit theft), 455, 457 (with intent to commit theft), 454 (with intent to commit theft), 455, 457 (with intent to commit theft), 458 to 462, 465, 477 and 477A or under section 52 of the Indian Post Office Act, 1898.

XLV of 1860.

VI of 1898.

Notes :—The object of this Act is to make better provision for the control of money-lenders and for the regulation and control of money-lending.

The Act will not apply to all money-lenders and will not affect all kinds of money-lending. A number of exceptions have been

recognised and these will be found in clauses (a) to (i) of sub-section (12) of section 2.

The main provisions of the Act may be classified under four heads :—

(1) Provisions for the registration and licensing of money-lenders.

(2) Provisions for the regulation of accounts of money-lenders.

(3) Provisions limiting the amount and rate of interest recoverable, and

(4) Provisions by which powers have been given to the Courts for the relief of the debtors.

A short summary of the main provisions of the Act under each of the above heads is given below :—

(1) Provisions for the registration and licensing of money-lenders :—

(a) There shall be a Provincial Registrar and as many Registrars and Sub-Registrars of money-lenders as the Provincial Government may determine.

(b) Each Sub-Registrar shall maintain a register of money-lenders holding licenses issued by him.

(c) No money-lender shall carry on money-lending business except under licence.

(d) A fee of Rs. 15 is to be paid for a licence.

(e) An application for licence is to be made to the Sub-Registrar within whose jurisdiction the money-lender carries on his business.

(f) If a money-lender lends money without taking out a licence, he will not be entitled to get a decree for the recovery of the money unless he pays a penalty to be fixed by the Court not exceeding three times the licence fee.

(2) Provisions for the regulation of accounts of money-lenders :—

(a) Every money-lender shall keep a cash book, a ledger and a receipt book. At the time the loan is given, the lender shall give to the borrower, a statement showing details of the condition of the loan. For every payment made by the borrower, the lender should give a receipt. When the loan has been re-paid in full, the lender shall cancel the paper signed by the borrower.

(b) Every money-lender shall, within two months of the commencement of each year, furnish each of his borrowers with a statement of accounts.

(c) The penalty for non-compliance with the above provisions,

is that in a suit by the lender the Court may disallow the whole or a portion of the interest due and may also disallow costs.

(3) Provisions limiting the amount and rate of interest recoverable :—

(a) A borrower shall not be liable to pay any sum in respect of principal and interest which together with any amount already paid or included in any decree exceeds twice the principal of the original loan.

(b) A borrower shall not be liable to pay on account of interest a sum greater than the principal outstanding.

(c) A borrower shall not be liable to pay interest at a rate per annum, exceeding, in the case of unsecured loans, 10 per cent. simple, and in the case of secured loans, 8 per cent. simple.

(d) No interest will be allowed on decretal amount if the loan was advanced before the Act. If it was advanced after the Act, interest may be allowed at a rate not exceeding 6 per cent. per annum on the principal sum adjudged.

(4) Provisions by which powers have been given to the Courts for the relief of the debtors :—

(a) In a mortgage suit the Court shall direct, at the time of passing the preliminary decree, that the amount due is to be paid by instalments.

(b) In other suits if the loan was advanced before the Act, the Court shall order that the decretal amount shall be payable without interest in annual instalments within such period not exceeding 20 years as the Court thinks fit. If a decree has already been passed, the Court shall on the application of the judgment-debtors, direct payment of the decretal amount by such instalments.

(c) In a suit under the Act, the Court shall reopen any transaction and take an account between the parties, shall reopen any account already taken and release the borrower of all liability in excess of the limits laid down in clauses (1) and (2) of section 30. If any amount was paid in excess of such limit on or after 1st January, 1939, the Court shall direct that such amount should be refunded. In exercise of these powers the Court shall not reopen any adjustment or agreement entered into more than 12 years before the suit, nor shall do anything which will affect a decree which was fully satisfied by 1st January, 1939, or any award under the Bengal Agricultural Debtors Act.

Operation of the Statute: The Act shall come into operation on the 1st of September, 1940, Vide, Calcutta Gazette, Extraordinary issue, dated 3rd August, 1940.

APPELLATE CIVIL.

Before Mr. Justice A. N. Sen.

SM. ANANTAMONI DASSI AND OTHERS

v.

BHOLA NATH MANNA.*

CIVIL.

1940.

June, 11, 12, July, 2.

Bengal Tenancy Act (VIII of 1885), section 182—Creation of homestead tenancy prior to acquiring the right of an occupancy raiyat—Code of Civil Procedure (Act V of 1908), section 11—Decision as to title by a Court of Small Causes, if res judicata in a subsequent suit.

A tenant would acquire the right of an occupancy raiyat in the homestead although such homestead tenancy was created prior to the acquisition of the occupancy right and the provisions of section 182 of the Bengal Tenancy Act, would be attracted :

Pulin Chandra Daw v. *Abu Bakhar Naskar* (1) relied on.

Section 11 of the Code of Civil Procedure does not codify or chrystallise the entire law regarding the doctrine of *res judicata.* The section deals with some of the circumstances under which a previous decision will operate as *res judicata* but not with all.

So where circumstances other than those provided for in section 11 of the Code of Civil Procedure exist the principle underlying the rule of *res judicata* may be invoked in a proper case without recourse to the provisions of that section. But that does not mean that the provisions of section 11 of the Civil Procedure Code may be flouted or overriden or that the prohibitions or reservations express or implied in that section may be ignored.

The decision of a Court of Small Causes regarding a question as to title in a suit for rent, will not operate as *res judicata* in a subsequent suit.

Suit for a declaration.

The material facts will appear from the judgment.

Messrs. Hiralal Chuckerbutty and *Bireswar Chatterjea* for the Appellants.

Messrs. Gopendra Nath Das and *Khetra Mohan Chatterjea* for the Respondent.

C. A. V.

* Appeal from Appellate Decree No. 971 of 1938 against the decree of E. S. Simpson, Esq., Additional District Judge of 24-Parganas, Second Court, dated the 7th February, 1938, affirming that of Prosad Chandra Banerjee, Esq., Munsiff, Second Court, Sealdah, dated the 13th September, 1937.

(1) (1936) 40 C. W. N. 599.

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The judgment of the Court was as follows:

Sen, J. :—Two points arise for decision in this appeal viz.:

(1) Whether the plaintiff has acquired the right of a raiyat with respect to his homestead by reason of the fact that subsequent to his taking the lease of the homestead he has acquired the right of a raiyat in the contiguous village,

AND

(2) Whether the plaintiff's claim that the Bengal Tenancy Act will apply to his tenancy is barred by the doctrine of *res judicata* inasmuch as a decree passed by the Court of Small Causes in a previous suit has declared that the tenancy is governed by the Transfer of Property Act.

Both these points have been decided in favour of the plaintiff and the defendants appeal.

It is now admitted that the land held by the plaintiff under the defendants is homestead land and that it was taken for residential purposes. There is no evidence that at the time the plaintiff held any land in the village or the neighbouring village as a raiyat. The lease of the homestead was taken in 1907. In 1928-1929 the plaintiff took settlement of land in the contiguous village as a raiyat. It has been held by the Courts below that by reason of this fact the provisions of section 182, Bengal Tenancy Act were attracted and the plaintiff acquired a raiyati right in the homestead lard. The section says that when a raiyat or under-raiyat holds his homestead otherwise than as part of his holding within the same or any contiguous village, his rights as raiyat or under-raiyat with respect to the holding will attach to the homestead tenancy and that tenancy shall be governed by those provisions of the Bengal Tenancy Act which are applicable to raiyats or under raiyats as the case may be. The contention of the appellants is that the section pre-supposes that the agricultural tenancy in the same or contiguous village was held at the time that the homestead tenancy was created. It was argued that the terms and nature of the homestead tenancy cannot be altered by a subsequent acquisition of a raiyati tenancy in the same village or contiguous village. This view seems to have been entertained by Mukherjea, J. in the case of *Badal Chandra Sadhukhan v. Debendra Nath Dey* (1) which was the decision of a single Judge. I am bound however by the later decision of a Divisional Bench of this Court in the case of *Pulin Chandra Daw v. Abu Bakkar Naskar* (2) when this very question was raised. It was argued

(1) (1932) 37 C. W. N, 473.
(2) (1936) 40 C. W. N. 599.

Civil.

1940.

Sm. Anantamoni Dassi v. Bhola Nath Manna.

Sen, J.

there that the subsequent acquisition of the status of an occupancy raiyat by a tenant cannot take away the contractual right of the landlord in respect of a homestead tenancy created prior to the acquisition of such right. This argument was repelled and it was held that even in such a case the tenant would acquire the right of an occupancy raiyat in the homestead. The first point taken must therefore be decid ad against the appellant.

There remains the question whether the plaintiff's claim is barred by the principles underlying the doctrine of *res judicata.* The defendant-landlords sued the plaintiff for rent in the Court of Small Causes. The plaintiff contended in that Court that the tenancy was governed by the Bengal Tenancy Act and not by the Transfer of Property Act. This point was considered by the Court of Small Causes and it decided that the tenancy was governed by the Transfer of Property Act. It is now argued by the defendant appellants that the decision of the Court of Small Causes will operate as *res judicata* and bar the present claim that the tenancy is one governed by the Bengal Tenancy Act. The contention has been repelled by the lower appellate Court on the ground that as the Small Causes Court has no jurisdiction to try the present suit its decision in the previous suit will not bar the trial of this point in the present suit. The Court below evidently relied upon the provisions of section 11 of the Code of Civil Procedure whereby it is expressly laid down that for the bar of *res judicata* to apply the Court which decided the point in the first suit must have been competent to try the subsequent suit.

On behalf of the appellant it is conceded that under section 11 of the Code of Civil Procedure the previous decision would not operate as *res judicata* in the present suit, but it is argued that this section is not exhaustive and that apart from this section a decision might operate as a bar on principles analogous to those underlying the doctrine of *res judicata.* For this proposition reliance is placed on a series of well-known decisions of the Judicial Committee—*Vide*—the cases of *Hook* v. *Administrator-General of Bengal* (1); *T. B. Rama Chandra Rao* v. *A. N. S. Rama Chandra Rao* (2); *Maung Sein Done* v. *Ma Pan Nyun* (3). There can be no question that section 11 of the Code of Civil Procedure does not codify or crystallize the entire law regarding the doctrine of *res judicata.* The section deals with some of the circumstances under which a previ-

(1) (1920-21) 48 I. A. 187; 33 C. L. J. 405.
(2) (1921-22) 49 I. A. 129; 35 C. L. J. 545.
(3) (1932) 59 I. A. 247 (254); 55 C. L. J. 403.

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ous decision will operate as *res judicata* but not with all. Where circumstances other than those provided for in section 11 exist the principle underlying the rule of *res judicata* may be invoked in a proper case without recourse to the provision of that section. This is what the Privy Council has laid down in the abovementioned cases but obviously these decisions cannot be interpreted to mean that the provisions of section 11 may be flouted or overriden or that the prohibitions or reservations express or implied in that section may be ignored. To adopt such an interpretation would lead to the impossible position where one would have to hold that the provisions of the Code have been abrogated by judicial decision. This is what the learned Advocate for the appellant would want me to do. An examination of the provisions of section 11 make it quite clear that under that section the claim of the plaintiff for a declaration that his tenancy is to be governed by the Bengal Tenancy Act is not barred by the decision of the Court of Small Causes to the effect that it is not so governed. Section 11 lays down that a decision in a suit will operate as *res judicata* and bar a subsequent suit provided that the Court which decided the first suit was competent to decide the subsequent suit. In the present case the first decision was by a Court of Small Causes which has not the jurisdiction to try a title suit like the present one. None of the decisions referred to by the learned Advocate for the appellant has laid down that the rule of *res judicata* could be invoked in a case when the Court which tried the first suit had not the jurisdiction to try the second suit. The decisions of the Privy Council merely extend the effect of section 11 of the Code of Civil Procedure by applying the principle recognised by the section to circumstances for which the section has not made express provision. In the cases of *T. B. Rama Chandra Rao* v. *A. N. S. Ramchandra Rao* (1) and *Kalipada De* v. *Dwijapada Das* (2) the first decision was not made in a suit but in Land Acquisition proceedings. It was held that such a decision would operate as *res-judicata* and bar a subsequent suit although section 11 of the Code of Civil Procedure which related only to decisions in suits did not in terms apply. It was said that section 11 of the Code was not exhaustive as regards the rule of *res-judicata*. In the case of *Hook* v. *Administrator General of Bengal* (3) the first decision was arrived at in an administration suit and it was held that the decision operate as *res-judicata* in subsequent proceedings

(1) (1921-22) 49 I. A. 129; 35 C. L. J. 545.
(2) (1929) L. R. 57 I. A. 24; 51 C. L. J. 142.
(3) (1920-21) 48 I. A. 187; 33 C. L. J. 405.

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in the same suit. There also reliance was placed on general principles of *res-judicata* as section 11 did not apply in terms. In none of these decisions was it ever suggested that where the section 11 was applicable its provisions could be overriden by reference to general principles of *res judicata*. On the contrary in the case of *Gokul Mandar* v. *Fudmanund Singh* (1) the Judicial Committee laid it down that section 13 of the then Code which corresponds to section 11 of the present Code was exhaustive in the matters in respect of which it declares the law. This is what their Lordships said :—"They will only observe in reference to arguments addressed to them that under section 13 of the Civil Procedure Code a decree in a previous suit cannot be pleaded as *res-judicata* in a subsequent suit unless the Judge by whom it was made had jurisdiction to try and decide not only the particular matter in issue but also the subsequent suit itself in which the issue is subsequently raised. In this respect the enactment goes beyond section 13 of the previous Act X of 1877 and also as appears to their Lordships beyond the law laid down by the Judges in the *Duchess of Kingston's* case (2). They will further observe that the essence of a Code is to be exhaustive on the matters in respect of which it declares the law and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction." A similar view was taken in the case of *Rajah Run Bahadoor Singh* v. *Mussmut Lachoo Koer* (3) where their Lordships approved of the dictum of Sir Barnes Peacock in the case of *Mussamut Edun* v. *Mussamut Bechun* (4) which was as follows :—"In order to make the decision of one Court final and conclusive in another Court it must be the decision of a Court which would have jurisdiction over the matter in the subsequent suit in which the first decision is given in evidence as conclusive".

I hold therefore, that the decision of the Court of Small Causes will not operate as *res-judicata* in the present suit.

The result is that the decision of the Court below must be upheld and this appeal must be dismissed with costs.

Leave to appeal under section 15 of the Letters Patent is refused.

P. R. *Appeal dismissed.*

(1) (1902) 6 C. W. N. 825.
(2) (1776) 2 Smith's Leading Cases, 10th Edn., p. 713.
(3) (1884) L. R. 12 I. A. 23 ; I. L. R. 11 Calc. 301.
(4) (1867) 8 Suth. W. R. 175.

CRIMINAL REFERENCE.

Before Mr. Justice N. G. A. Edgley.

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July, 4, 5, 16.

HAFIZAR RAHAMAN

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Code of Criminal Procedure (Act V of 1898), section 192, sub-section (1)—Transfer of a case—Piecemeal transfer—Clear indication in the order of the transfering Magistrate—Power of Magistrates—Cognisance of a matter—Transfer of cases by Sub-divisional Magistrates—Scope of such transfer—Code of Criminal Procedure (Act V of 1898), sections 202, 528, 530 and Chapters VII, XII, XVIII, XX, XXI.

When a case bas been transferred to a Magistrate under section 192, sub-section (1) of the Code of Criminal Procedure, that Magistrate has the same authority to deal with the case which has been transferred to him, as regards the issuing of the processes and other matters connected with the inquiry or trial, as is vested in the Superior Magistrate from whom he received the case.

Although piecemeal transfer of a case is in certain circumstances valid, that portion of the case which has not been transferred must be clearly stated in the order of transfer recorded by the transfering Magistrate who acts under section 192 of the Code of Criminal Procedure. In the absence of clear indication as to which part of the case has been retained on the file of the transfering Magistrate or some further indication to the effect that such Magistrate intended to dismiss the complaint against those accused persons in respect of whom he did not issue process, it must be taken that the whole case has been transferred to the Subordinate Magistrate, not only against the accused persons actually summoned but against all other persons whom the Subordinate Magistrate might consider to be implicated in the offence.

The Magistrate to whom a case is transferred under section 192 of the Code of Criminal Procedure must be empowered to try it, otherwise the trial will be void under section 530 of the Code of Criminal Procedure.

Section 192, sub-section (1) refers not merely to taking cognisance of offences of which cognisance has been taken and the language used is wider in character than that which had been employed in section 190, sub-section (1).

Therefore cognisance may be taken by a Magistrate of any matter in respect of which an enquiry or trial may be held under the provisions of the Code of Criminal Procedure.

Although section 192 appears in Part VI, of the Code of Criminal Procedure relating to proceedings in prosecutions, it is sufficiently wide to cover cases under the Code, other than criminal cases.

* Criminal References Nos. 60 and 61 of 1940 and Criminal Revision Case No. 437 of 1940 by G. B. Synge, Esq., Sessions Judge, Chittagong, dated 14th March, 1940 recommending revision of the orders of Mr. A. C. Roy, Honorary Magistrate Chittagong, dated the 5th February, 1940.

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The Magistrates mentioned in section 192, sub-section (1) of the Code of Criminal Procedure, have power to transfer the cases to Subordinate Magistrates either for the purpose of holding a trial *e. g*, under Chapter XX or XXI of the Code or for enquiry under Chapters VIII, XII and XVIII of the Code.

A Magistrate who orders an enquiry under section 202 of the Code of Criminal Procedure, does not transfer the case at all.

So an order for an enquiry under section 202 of the Code of Criminal Procedure, cannot operate as a transfer under section 192, sub-section (1) of the Code.

It is competent for a Sub-divisional Magistrate to transfer a case as soon as the accused person has appeared or at any time thereafter when the case becomes ready for the enquiry or trial. It would also be competent for him to transfer the case to a Subordinate Magistrate immediately after the complainant has been examined and it would then be for the Subordinate Magistrate to decide whether he would issue process immediately or postpone the issue of such process for the purpose of holding a preliminary investigation under section 202 of the Code of Criminal Procedure for ascertaining the truth or falsehood of the complaint.

When a case has been transferred under section 192, sub-section (1), it is transferred for all purposes from the file of the Superior Magistrate to that of the Subordinate Magistrate and thereafter, the Superior Magistrate has no jurisdiction to issue any orders connected with the case except such as are contemplated under the provisions of section 528 or Chapter XXXII of the Code of Criminal Procedure.

Reference under section 438 of the Code of Criminal Procedure.

The material facts will appear from the following order of

Reference.

I. A brief analysis of the cases :—

The facts of the first case are that on 19th February, 1939 Hafizar Rahaman filed a complaint against four persons alleging offence on 10th February, 1939 under sections 427, 447 and 352 Indian Penal Code. After an enquiry had been held the first accused Aminar Rahaman was summoned. He died on 15th August, 1939 before any evidence had been taken. The complainant filed a petition before the Honorary Magistrate to whom the case had, on 9th June, 1939, been transferred asking that as accused No. 1 was dead and the other accused were trying to disposess the complainant by force, the remaining accused should be summoned. The Magistrate summoned only accused No. 2, son of the accused that died, and tried him and convicted him under section 427 Indian Penal Code sentencing him to pay a fine of Rs. 40.

The other case arises out of a complaint lodged on 17th April, 1939 by the same Hafizar Rahaman against 7 accused alleging an offence on 12th April, 1939 under sections 447, 504 and 143 Indian

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Penal Code. After enquiry the same Aminar Rahaman was summoned, and the case was transferred to the same Honorary Magistrate on the same day as the other case. As in the other case, it was reported by the complainant that the accused was dead and that the others were trying to dispossess the complainant by force, and the Magistrate summoned the accused No. 1, brother of the deceased, and convicted him under section 447 Indian Penal Code and sentenced him to pay a fine of Rs. 25.

II. The order recommended for revision :—

The orders recommended for revision are those passed by Babu Aparna Charan Roy, Honorary Magistrate, First Class, on 5th February, 1940, one convicting the accused Nural Haque [petitione in Criminal Motion No. 17 of 1940 (1st order)] under section 427 Indian Penal Code and sentencing him to pay a fine of Rs. 40, in default to undergo R. I. for one month, and the other convicting accused Aminal Haque [petitioner in Criminal Motion No. 16 of 1940 (1st order)] under section 447 Indian Penal Code and sentencing him to pay a fine of Rs. 25 in default to undergo R. I. for three weeks.

III. In what particular portion of that order the Court considers an error on a point of law to exist.

(a) In absence of determination of the question whether the acts complained of were offences.

(b) In summoning other persons on the death of the original accused.

(c) Both cases concern the same land. In respect of the earlier, the complainant alleged that the accused, ordered by the Khas Mahal authorities to dig out a Khas Mahal Khal of which he and the complainant had tried to take settlement, had cut away parts of two plots belonging to the complainant. Both plots adjoin the Khal. There is no finding in the judgment that the accused intended to cause loss to the complainant, or knew that it was likely, and the mere fact that some damage was caused does not justify the conviction. Nor is there sufficient evidence to justify finding of more than that the accused, even if he himself did any digging, was attempting to re-excavate the Khal at the bidding of the Khas mahal authority and made a mistake regarding the alignment. On that ground alone a reference is necessary to have the conviction set aside.

In the other case, of two months later, while the first case was still pending and when, if the first case were true, the new course of the Khal ran over nearly the whole of R. S. plot 7323 of Mouza

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Paschim Rauzan which the complainant claimed, it was alleged that the accused had trespassed on this plot 7323 and enclosed it. The Magistrate ignored the R. S. Khatian which shows that half of this plot was in possession of the accused's party, 1½ gandas out of 3 gandas, held that the complainant had been in possession of the entire plot for 12 years (although the R. S. Khatian was printed only 10 years ago) and found the trespass proved. The documents proved by the accused were ignored. According to the Khatians Aminar Rahaman, the original accused, was in possession of half of plot No. 7323 and half of plot No. 7325, Dalilar Rahaman being in possession of the other halves. In 1938 another Hafizar Rahaman and one of his co-sharers both in the same group as Aminar Rahaman, bought Dalilar Rahaman's shares out of plot No. 7325. This makes the complainant's story that there had been an amicable arrangement with Dalilar Rahaman by which Aminar and his co-sharers obtained the whole of plot No. 7325 while Dalilar obtained the whole of plot No. 7323 look silly. Moreover had there been such an arrangement it must have been before 1928 when Dalilar granted a potta for plot No. 7323 to the complainant. Had it been before that it must have been recorded so in the Khatian. To this must be added the fact that the potta, although it correctly gives the plot number, mentions an area of only 2 gandas, whereas the area of the whole plot is 3 gandas. It appears likely that Dalilar did not even claim title to the whole plot, but was thinking of only his half share. However that may be, it seems that the Magistrate, who has accepted the complainant's case at least partly because he said that the accused prevented him from obtaining witnesses, has convicted the accused on most inadequate evidence, assuming, against the documentary evidence, that it was possible for the accused to trespass upon land in which he had the right to enter. Consequently a Reference is necessary.

(b) But the chief question of law, common to both cases, remains to be presented. It is whether the Honorary Magistrate has jurisdiction to summon, in one case the son, and in the other the brother, of the accused. He was summoned either on the ground that, the man summoned being dead, a relation ought to be prosecuted or on the ground that, months after the original complaints, the relations were threatening the complainant with dispossession. The Magistrate has not recorded his reason for summoning the relation.

On the precise question in issue there appears to be no authority. The Sub-Divisional Magistrate, took cognizance of both

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the offences. The Code of Criminal Procedure, in section 192(1) mentions the only occasion on which a Sub-Divisional Magistrate may transfer a "case" to another Magistrate for disposal, apart from the occasion when he withdraws or recalls a case and then transfers it. Section 192 (1) refers to a "case" of which he has taken cognizance.

Since Section 192 (1) refers only to transfer of a "case" of which Sub-Divisional Magistrate *has taken* cognizance, while section 190 refers to cognizance of an "offence," it would seem that the mere receipt of a complaint amounts to taking cognizance of it. Its transfer converts it into a "case".

This is further indicated by section 200 proviso (c) and by section 202 (1). The former contemplates that the Sub-Divisional Magistrate may transfer a "case" either before examining the complainant on oath or immediately afterwards. Section 202 (1) which allows for the postponment of the issue of process upon the accused by the Magistrate to whom the complaint had been transferred specifically mentions that the transfer will be under section 192, namely of a "case". Section 203 refers to the dismissal of a complaint by not only the Magistrate before whom it was made but also the Magistrate to whom it has been transferred.

Then comes section 204 which reverts to the phrase, "Magistrate taking cognizance of an offence". It would *prima facie* appear that the "case" is for issue of summons upon the accused, to go back to the file of the Magistrate who took cognizance of the "offence". It would therefore also seem that a Magistrate who has not taken cognizance of an "offence" has no jurisdiction to summon an accused person, although practice may be taken to have allowed the procedure of summoning an accused by a Magistrate who receives a case by transfer in its early stages.

The invariable practice throughout Bengal is that the Sub-Divisional Magistrate retains the case in his own file until after the accused summoned by him has appeared, and then transfers it for disposal to a Magistrate subordinate to him.

There is authority for the view that such subordinate Magistrate may, after taking evidence, summon some other accused should the evidence indicate that he also ought to be tried. If this view be correct, it would appear that there resides in such subordinate Magistrate an inherent power to summon a person other than the person selected by the Sub-Divisional Magistrate, although it is not specifically granted to him by the Code.

It seems probable that there is no body of rulings on this point for a simple reason that subordinate Magistrates are content to accept cases as they come to them, and do not question the right of the Sub-Divisional Magistrate to make the final selection of accused persons. And since, as I have submitted, the procedure followed, namely of transfering a case after the accused had appeared, does not appear to be the procedure contemplated by the Code there is no specific provision therein for such a case as the present, namely one in which the subordinate Magistrate summons another person to stand his trial when the original accused is dead.

It seems fundamentally wrong that a subordinate Magistrate should, without any evidence before him other than that on which the Sub-Divisional Magistrate has summoned one accused, of his own motion summon another. On the other hand it seems to be inconsonant with the ordinary rules of law that the mere taking of evidence in a case should endow such subordinate Magistrate with a jurisdiction that he had not when the case was first transferred to him. In short, either he always has jurisdiction to summon another accused or he never has it.

If, in the present two cases the subordinate Magistrate had not jurisdiction to summon another man to take the place of the sole accused summoned, when he died, the entire trial is void.

If, on the other hand, he had jurisdiction, it will be submitted that he acted so irregularly in the exercise of this jurisdiction that the conviction must be set aside.

In my view, when a case has been transferred for trial to a subordinate Magistrate, with one accused summoned and appearing, the death of that accused terminates the case and the jurisdiction of the Magistrate. The complainant's remedy is to make another complaint before the Sub-Divisional Magistrate. I submit that the subordinate Magistrate has no jurisdiction to summon another accused.

If jurisdiction does lie with him then I would recommend the setting aside of the convictions not only on the ground set forth earlier but also on the ground that the jurisdiction was exercised irregularly.

The only evidence before the Magistrate in both cases was the petition of complainant and the record of the complainant's statement on oath. If, upon this, the Sub-Divisional Magistrate correctly exercised his discretion in summoning but one accused the subordinate Magistrate must have exercised his discretion wrongly in

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summoning another. It must also be observed that the sole apparent reason why the subordinate Magistrate in these cases summoned another person was, that all the remaining accused named in the petition of complaint were said to he threatening the complainant with dispossession. Were that true, it should have been the basis of a different case. The Honorary Magistrate is not empowered to take cognizance of offences. But the petitions in which this allegation was made were treated as the basis of the cases; for the original complaints were left in the records of the cases against the man that died, which were thereupon closed, and different records were started, of which the first paper was the petition announcing the death of the accused and alleging threats.

(While the principle is not affected by this fact, it should be noticed that both these petitions must have been either false or irrelevant. In one case, as has been stated, the complaint was that the accused had committed mischief by making a Khal out of the complainant's land; and it is plain that a threat of dispossession was irrelevant. In the other case the complaint was that the accused had committed trespass by enclosing the complainant's land; and there could have been no further trespass in respect of it).

IV. *The grounds upon which, in the opinion of the Court, the order should be reversed.*

The grounds are :—

In the earlier case, there is no finding in the judgment that the accused in digging out the Khas Mahal Khal under orders of the Khas Mahal authorities, intended to cause loss to the complainant, or knew that it was likely, and the mere fact that some damage was caused does not justify the conviction. Nor is there sufficient evidence to justify a finding of more than that the accused, even if he himself did any digging, was attempting to re-excavate the Khal at the bidding of the Khas Mahal authority and made a mistake regarding alignment.

II. In the other case the Magistrate has convicted the accused on most inadequate evidence, assuming, against the documentary evidence, that it was possible for the accused to trespass upon land in which he had the right to enter.

III. When the cases were transferred to the Honorary Magistrate with one accused summoned and appearing in each case, the death of that accused terminated the cases and the jurisdiction of the Magistrate. The Honorary Magistrate was not empowered to

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take cognisance of offences and acted without jurisdiction in summoning fresh accused.

In all the circumstances I consider that the convictions should be quashed, and I request that the Hon'ble High Court will rule whether a subordinate Magistrate, whether with or without taking evidence, has jurisdiction to summon and prosecute, in a case which has been transferred to him for disposal after the accused who was summoned by the Sub-Divisional Magistrate has appeared, a person other than the accused before him.

Mr. Ajit Kumar Dutt with Mr. S. C. Talukdar in support of the Reference.

Messrs. Jitendra Mohan Banerjee and *Nirmal Kumar Sen* for the Crown.

Mr. Imam Hossain Choudhury, in Opposition to the Reference.

Mr. Hamidul Huq for the Petitioners in Revision Case No. 437.

No one for the Opposite Party.

C. A. V.

The judgment of the Court was as follows:

July, 16,

References Nos. 60 and 61 of 1940, have been made to this Court by the learned Sessions Judge of Chittagong with his letter, dated the 14th of March, 1940. They arise with reference to two accused persons who were convicted respectively in two separate cases under sections 427 and 447 of the Indian Penal Code. In the first of these cases Nurul Huq was convicted by Rai Sahib Aparna Charan Ray, Honorary Magistrate of Chittagong on the 5th of February, 1940, and sentenced to pay a fine of Rs. 40 and in the second case Aminal Haque was convicted by the same Honorary Magistrate on the same date and sentenced to pay a fine of Rs. 25. These two References have been heard together with a Rule issued in Criminal Revision Case No. 437 of 1940 as the main points for consideration in the two References and the Rule are similar.

In the first of these cases a man named Hafizar Rahaman had filed a complaint on the 19th of February, 1939 against certain persons in respect of alleged offences under sections 427, 447 and 352 of the Indian Penal Code. The main allegation was to the effect that the accused persons had committed mischief in respect of the complainant's land while they were engaged in cutting a Khal. An enquiry was held under the provisions of section 202 of the Code of Criminal Procedure and, thereafter, one of the accused persons Aminar Rahaman, was summoned.

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He appeared on the 9th of June 1939 and the case was then transferred to the learned Honorary Magistrate for disposal. Aminar Rahaman died on the 15th of August, 1939. Thereafter, on the 18th of August, 1939, the complainant filed a petition in which he stated that the other accused persons were taking advantage of Aminar Rahaman's death and were threatening to take possession of the complainant's land by force. He also stated that there was ample evidence against all the accused persons and in these circumstances he asked that the other accused might be summoned. The learned Honorary Magistrate then directed that one of the other accused persons, Nurul Huq, should be summoned. The case then proceeded to trial and this person was duly convicted under section 427 of the Indian Penal Code.

The second case related to a portion of the same land that was in dispute in the case under section 427 of the Indian Penal Code. It arose with reference to a complaint filed on the 17th of April, 1939, by Hafizar Rahaman against eight accused persons in which it was alleged that they had committed offences on the 12th of April, 1939, under sections 447, 504 and 143 of the Indian Penal Code. In this case it was alleged that the accused persons had trespassed into Plot No. 7323, which was in the possession of Hafizar Rahaman, and had encroached on the same by putting a fence round it ploughing it and planting trees thereon. In this case also the learned Sub-Divisional Magistrate directed an enquiry under section 202 of the Code of Criminal Procedure and he summoned Aminar Rahaman on the 1st June, 1939. Thereafter, on the 9th of June, 1939, he transferred the case to the learned Honorary Magistrate for disposal. After Aminar Rahaman's death on the 15th of August, 1939, the complainant filed a petition similar in terms to the one which was filed in the case under section 427 of the Indian Penal Code with the result that the learned Honorary Magistrate summoned one of the other accused persons, Aminal Haque, who was in due course convicted under section 447 of the Indian Penal Code.

In referring these two cases to this Court under the provisions of section 438 of the Code of Criminal Procedure the learned Sessions Judge of Chittagong expresses the opinion that in the first case the findings recorded by the learned Honorary Magistrate were insufficient to warrant a conviction, whereas in the second case he was of opinion that the accused had beed convicted on inadequate evidence.

The main ground, however, upon which the learned Judge referred these two cases was that, in his view, the learned Honorary Magistrate had no jurisdiction to summon persons against whom process had not been issued by the Sub-Divisional Magistrate before the cases were transferred to him. In this connection, he refers to section 204 of the Code of Criminal Procedure and states that "It would *prima facie* appear that the 'case' is, for issue of summons upon the accused, to go back to the file of the Magistrate who took cognisance of the 'offence'. It would, therefore, also seem that a Magistrate who has not taken cognisance of an 'offence' has no jurisdiction to summon an accused person." He goes on to say "In my view, when a case has been transferred for trial to a subordinate Magistrate, with one accused summoned and appearing, the death of that accused terminates the case and the jurisdiction of the Magistrate. The complainant's remedy is to make another complaint before the Sub-Divisional Magistrate. I submit that the subordinate Magistrate has no jurisdiction to summon another accused". The learned Judge concludes his letter as follows: "In all the circumstances I consider that the convictions should be quashed, and I request that the Hon'ble High Court will rule whether a subordinate Magistrate, whether with or without taking evidence, has no jurisdiction to summon and prosecute, in a case which has been transferred to him for disposal after the accused who was summoned by the Sub-Divisional Magistrate has appeared, a person other than the accused before him."

Criminal Revision Case No. 437 of 1940 relates to three petitioners who were convicted under sections 426 and 447 of the Indian Penal Code by Babu Bhupendra Nath Ghose, Honorary Magistrate of Tippera, on the 17th of January 1940. Originally, two other persons had been summoned in this case by the learned Sub-Divisional Magistrate of Tippera who, on the 7th of June, 1939, transferred the case to the learned Honorary Magistrate for disposal. On the 25th of July, 1939, the complainant was absent and the learned Honorary Magistrate acquitted the accused persons before him under section 247 of the Code of Criminal Procedure. Later, on the same day, the complainant filed an application in which he asked that process might issue against the other accused persons who had not been summoned by the Sub-Divisional Magistrate and the learned Honorary Magistrate thereupon summoned the petitioners under sections 447 and 426 of the Indian Penal Code and in due course convicted them under

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those sections. The only ground upon which the Rule was issued in this case was that the learned Honorary Magistrate had no jurisdiction to summon the petitioners.

The main point for consideration in these cases is whether a Magistrate to whom a case is transferred under the provisions of section 192 (1) of the Code of Criminal Procedure by reason of such transfer becomes vested with the same powers in respect of the case transferred to him as may be exercised by the Magistrate from whom he receives it on transfer.

Section 192 (1) of the Code is in the following terms: "Any Chief Presidency Magistrate, District Magistrate or Sub-Divisional Magistrate may transfer any case, of which he has taken congnisance, for inquiry or trial, to any Magistrate subordinate to him."

It is of course, obvious that the Magistrate to whom a case is transferred under section 192 must be empowered to try it, otherwise the trial would be void under the provisions of section 530 of the Code. In these cases, however, there can be no doubt that the learned Honorary Magistrates had jurisdiction to try the cases under sections 426, 427 and 447 of the Indian Penal Code.

The expression 'cognisance' has not been defined in the Code. This expression is also used in section 190(1) of the Code of Criminal Procedure, which empowers certain Magistrates to take cognisance of offences. On this point Stephen and Carnduff, JJ. pointed out in the case of *Emperor* v. *Sourindra Mohan Chuckerbutty* (1), that "taking cognisance does not involve any formal action, or indeed action of any kind, but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence." Section 192(1), however, refers not merely to taking cognisance of offences but to cases of which cognisance has been taken and the language used is wider in its character than that which has been employed in section 190 (1). It would, therefore, appear that cognisance may be taken by a Magistrate of any matter in respect of which an enquiry or trial may be held under the provisions of the Code of Criminal Procedure and, in taking cognisance of an offence or other case, for example cases under sections 107, 110 or 145 of the Code, a Magistrate merely takes seizin of the matter for the purpose of exercising the specific powers with which he has been vested under the Code in connection with the cases in question. As soon as a Magistrate duly empowered has taken cognisance of a

(1) (1919) I. L. R. 37 Calc. 412 (416).

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matter, there is a case before him which he is competent to transfer to a subordinate Magistrate under the provisions of section 192 (1) of the Code.

Although section 192 appears in Part VI of the Code relating to proceedings in prosecutions, it has nevertheless been held from its terms that it is sufficiently wide to cover cases under the Code other than criminal cases. In this connection Macpherson and Gordon, JJ. observed in the case of *Satish Chandra Panday* v. *Rajendra Narain Bagchi* (1), that "the power of transfer conferred upon Magistrates and Sub-Divisional Magistrates is a general power, and unless cases under chapter XII are expressly excluded, it must extend to them also. It is argued that section 192 applies only to criminal cases, as it occurs in a chapter which deals with offences, and the preceding section relates to the cognizance of offences. The words are, however, quite wide enough to include cases under Chapter XII. We may observe also that in the Code of 1872, section 44, which is the section corresponding to section 192, provided only for the transfer of 'criminal cases.' By the amending Act XI of 1874 the word 'criminal' was struck out, and it has been omitted from all the subsequent enactments." Again, in the case of *Lolit Mohan Moitra* v. *Surja Kanta Acharjee* (2), Mr. Justice Ghose holds that a Magistrate taking cognisance of a case under section 145 is a Criminal Court within the meaning of the Code and he also refers to cases under sections 107 and 110 of the Code as criminal cases which District Magistrates or Sub-Divisional Magistrates would have jurisdictions to transfer under sections 192 of the Code. Further, in the case of *Chintamon Singh* v. *Emperor* (3), Rampini and Sharfuddin, JJ. said :—"It is to be observed that the expression used in section 192, clause (1) of the Criminal Procedure Code is '*any case*,' and not any '*criminal case*.' It has been contended that section 192 of the Criminal Procedure Code applies only to criminal cases, as it is part of a Chapter which deals with offences, and the preceding section relates to the cognisance of offences. The words are, however, quite wide enough to include cases under Chapter VIII of the Criminal Procedure Code." It is, therefore, clear that the Magistrates mentioned in section 192(1) of the Code have power to transfer cases to subordinate Magistrates either for the purpose of holding a trial, for example under

(1) (1895) I. L. R. 22 Calc. 898 (901-2).
(2) (1901) I. L. R. 28 Calc. 709 (713).
(3) (1907) I. L. R. 35 Calc. 243 (256) ; 7 C. L. J. 177 (181).

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Chapters XX or XXI of the Code, or for enquiry for example under Chapters VIII, XII or XVIII of the Code.

It is, however, argued that, in view of the terms of section 204 of the Code of Criminal Procedure, the only Magistrate who has power to issue summons for the attendance of accused persons is the Magistrate who takes cognisance of the offence and that, in this view of the case, the learned Honorary Magistrates had no jurisdiction to issue process against any persons other than those who had been summoned by the Sub-Divisional Magistrates before the cases were transferred by them. It is, however, clear from the provisions of section 202 of the Code that the Magistrate who takes cognisance of an offence is not vested with an exclusive jurisdiction as regards the issue of process, as section 202 provides that a Magistrate to whom a case has been transferred under section 192 "may, if he thinks fit, for reasons to be recorded in writing, postpone the issue of process for compelling the attendance of the person complained against". It follows, therefore, by implication that, if such a Magistrate has power to postpone the issue of process against an accused person, he has also power to issue process and that this power is not limited by the terms of section 204.

In this connection, it was argued that the inquiry for wuich a case may be transferred under section 192 (1) of the Code means an inquiry under section 202 and that the latter section merely empowers the subordinate Magistrate who has been directed to hold the inquiry to postpone the issue of process by the transferring Magistrate pending the result of the inquiry. The learned Advocate contends that, if a *prima facie* case is made out, the subordinate Magistrate should send the case back to the transferring Magistrate who may then issue process under section 204 of the Code and it is suggested that, if the superior Magistrate then wishes to transfer a case for trial, he may again transfer it under section 192 (1) of the Code and at this stage the Magistrate to whom the case is transferred would follow the procedure laid dowd in Chapters XX and XXI of the Code.

I am not prepared to accept the above argument. I have already pointed out that the term "inquire" in section 192 (1) is used with special reference to such inquiries as are held in connection with proceedings under Chapters VIII, XII and XVIII of the Code. The inquiry which is contemplated by section 202, on the other hand, is merely for the limited purpose of ascertaining the truth or falsehood of a complaint in order to enable the

Magistrate to decide whether an accused person should be summoned or the complaint against him should be dismissed under section 203. The plain meaning of section 192 (1) of the Code is that a case which is transferred to a subordinate Magistrate under that section is transferred to him in order that he may complete the inquiry or trial to be held in connection with the case and take all requisite steps to that end. The holding of an inquiry under section 202 in a suitable case is merely one of such requisite steps to be taken by a Magistrate who has taken cognisance of a case or to whom a case may have been transferred for trial under section 192 (1). It is clear that, a Magistrate who orders an inquiry under section 202 of the Code does not transfer the *case* at all. Ordinarily he merely retains the case on his own file and directs some suitable person to hold an inquiry and send the report to him. It follows therefore that an order for an inquiry under section 202 of the Code cannot operate as a transfer under section 192 (1). Another step requisite to the completion of the trial is the issue of process against the person or persons whom it is intended to prosecute, and I have already pointed out that the language of section 202 of the Code shows that a subordinate Magistrate to whom a case has been transferred under section 192 (1) has the power to issue such process. It, therefore, follows that, when once a case has been validly transferred to a subordinate Magistrate under section 192 (1) of the Code, such Magistrate would have no authority to return the case to the transferring Magistrate in order that the latter might issue process under section 204 and his duty would be to complete the trial according to law.

It is true, as pointed out by the learned Sessions Judge, that the usual practice throughout Bengal "is that the Sub-Divisional Magistrate retains the case in his own file until after the accused summoned by him has appeared, and then transfers it for disposal to a Magistrate subordinate to him". The learned Judge seems to hold the view that this is not the procedure contemplated by the Code. If, however, sections 192 (1), 202 and 204 are read together, it is clearly competent for the Sub-Divisional Magistrate to follow this procedure and to transfer the case as soon as the accused person has appeared or at any time thereafter when the case becomes ready for the inquiry or the trial. It would be equally competent for the Sub-Divisional Magistrate to transfer the case to a subordinate Magistrate immediately after the complainant had been examined and, having regard to the provisions of section

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202 of the Code, it would then be for such subordinate Magistrate to decide whether he would issue process immediately or postpone the issue of such process for the purpose of holding a preliminary investigation under that section for the purpose of ascertaining the truth or falsehood of the complaint. When, however, a case has been transferred under section 192 (1), it is transferred for all purposes from the file of the superior Magistrate to that of the subordinate Magistrate and, thereafter, the superior Magistrate has no jurisdiction to issue any orders connected with the case except such as are contemplated under the provisions of section 528 and or Chapter XXXII of the Code.

This was the view adopted by this Court in the case of *Golapdy Sheikh* v. *Queen-Empress* (1) in which it was held that, where cognisance had been taken of an offence on a police report and the case had been made over to a subordinate Magistrate, so long as the case connected with that offence remained with the subordinate Magistrate, no other Magistrate was competent to deal with it and applications for warrants against other persons concerned in that offence should be made to the Magistrate to whom the case had been transferred and to no other Magistrate. A similar view was adopted by Stevens & Mitra JJ. in the case of *Radhabullav Roy* v. *Benode Behari Chatterjee*, (2), in which the learned Judges observed that "We think that when once the District Magistrate made the case over for disposal to the Deputy Magistrate, it was out of his hands and he was not competent to pass any order relating to it other than an order such as might have been made by him under Chapter XXXII of the Code". It was also pointed out by Chotzner and Gregory JJ. in the case of *Hemendra Nath Sen* v. *Emperor* (3) that, in a case in which after issue of process the case had been transferred to another Magistrate who discharged the accused person against whom process had issued and then *suo motu* issued process against another person under section 191 (c) of the Code, the trying Magistrate stood in the shoes of the Magistrate who had originally issued process and had full authority to deal with the case as if he himself has taken cognisance of it.

From the abovementioned cases it follows that, when a case has been transferred to a Magistrate under section 192 (1) of the Code of Criminal Procedure that Magistrate has the same autho-

(1) (1900) I. L. R. 27 Calc. 979.
(2) (1902) I. L. R. 30 Calc. 449 (451-2).
(3) (1928) I. L. R. 55 Calc. 1274.

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rity to deal with the case which has been transferred to him, as regards the issuing of the processes and other matters connected with the inquiry or trial, as is vested in the superior Magistrate from whom he received the case on transfer.

It is, however, argued that the only cases which had been transferred were the cases against those persons who had originally been summoned by the Sub-Divisional Magistrate, namely Aminar Rahaman in the case under sections 447 and 427 of the Indian Penal Code and Asaruddin and Tamijuddin in the case under section 447 read with section 426 of the Indian Penal Code. It is argued that, as a result of the preliminary investigations under section 202 of the Code, the Sub-Divisional Magistrate who took cognisance of the cases was satisfied that there was sufficient ground for proceeding against those persons only and, as he issued process only against them it must be taken that he did not wish to proceed against the other accused persons and, therefore, transferred to the learned Honorary Magistrate merely the cases of those persons whom he had summoned.

In the first two cases the order of transfer was that "the case is transferred to Rai Sahib A. C. Ray for favour of disposal". In the other case the order of transfer was to Babu B. N. Ghosh, Honorary Magistrate "for disposal". It was, however, held in the case of *Ajab Lal Khirher* v. *Emperor* (1) that orders of this nature mean that the whole case is transferred so that it is competent for the subordinate Magistrate to issue process for the attendance of any persons whom he may consider to have been concerned in the commission of the offence. Mr. Justice Henderson pointed out that "It is not necessary in a matter of this kind that the entire case should be transferred. Whether such a ttansfer has been made is a question of fact depending on the intention of the Officer making the order, which intention must be gathered from the order itself. Where no reservation is made as in the cases cited and in the case before us, I should certainly conclude that the entire case (in the sense abovementioned) had been transferred". A similar point came under consideration in *In re. Asim Sheikh* (2). In that case a complaint had been lodged against several persons and the Sub-Divisional Magistrate after examining the complainant issued summons against one of the accused only. He passed no order with regard to the others.

(1) (1905) I. L. R. 32 Calc. 783 (789-90).
(2) (1907) 7 C. L. J. 249.

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He then transferred the case to an Honorary Magistrate who after taking evidence acquitted the person who had been summoned, but issued process against one of the other accused persons. The learned Judges held that, as regards the question whether the Honorary Magistrate could take cognisance of the case as against Azim, it appeared that the Sub-Divisional Magistrate took cognisance of the whole case and transferred it under section 192 to the Honorary Magistrate. They observed that "the fact, that he did not summon Azim, did not amount to a dismissal of the case as against Azim, nor could it annul the cognisance which he had already taken of the case as a whole. We think that the case must be regarded as having been transferred as a whole to the Honorary Magistrate, and indeed, it appears to us open to considerable doubt whether under that section a case can be transferred piecemeal".

The law with regard to this point seems now to be well settled and, as pointed out by Mr. Justice Macpherson in the case of *Deonarain Singh* v. *King Emperor* (1), "Since 1900 when the decision in *Golapdy Shaik* v. *Queen-Empress* (2) was given, there has been a *cursus curiae* that once the Sub-Divisional Magistrate having taken cognisance of an offence on a charge-sheet submitted by the police in circumstances like the present, has made over to a subordinate Magistrate the charge-sheet and the accused forwarded by the police in custody or bail with an order that the transfer is 'for disposal', he has made over the judicial investigation into the offence and not merely the judicial investigation into the offence so far as regards the particular accused" * * * * * "In the present instance, the order itself appears to show that the whole case was made over. If the whole case was made over, the Deputy Magistrate had full seisin of it".

I myself share the doubts expressed in *Azim Sheikh's* case (3) as to the legality of the piecemeal transfer of a case under section 192 (1) of the Code of Criminal Procedure, subject to the authority of a Magistrate who takes cognisance of an offence on complaint* to dismiss the complaint as against some of the persons whom it is sought to prosecute and to leave the case open as against others. But it is clear that, even if such piecemeal transfer is in certain circumstances valid, that portion of the case which

(1) (1933) I L. R. 12 Pat. 341.
(2) (1900) I. L. R. 27 Calc. 979.
(3) (1907) 7 C. L. J. 249.
* At page 250 of 7 C. L. J.—Ed.

has not been transferred must be clearly indicated in the order of transfer recorded by the transferring Magistrate who acts under section 192 of the Code. In the absence of a clear indication as to which part of the case is retained on the file of the transferring Magistrate or some further indication to the effect that such Magistrate intended to dismiss the complaint against those accused persons in respect of whom he did not issue process, it must be taken that the whole case had been transferred to the subordinate Magistrate not only as against the accused person actually summoned but against all other persons whom the subordinate Magistrate might consider to be implicated in the offence.

In the cases with which we are now dealing it is argued that the learned Honorary Magistrates had no material before them from which it was possible for them to reach an opinion that there was sufficient ground for issuing process. It is not necessary that the opinion to this effect within the meaning of the section 204 of the Code of Criminal Procedure should be based on evidence in the case now that the reasons for such an opinion should be recorded. In all the three cases the sworn statements, the reports of the enquiry officers under section 202 of the Code and the petitions of complaint were before the learned Honorary Magistrate. It must be presumed that they had perused these documents and the other papers on the record and that, after having done so, they were of opinion that there was sufficient ground for proceeding against some of the accused persons other than in respect of whom process had originally been issued.

Further, I am not prepared to hold that the death of Aminar Rahaman in the cases under sections 447 and 427 of the Indian Penal Code had the effect of terminating the proceedings in those cases. The cases against the other accused persons mentioned in the petitions of complaint remained undecided until the Magistrate to whom the cases had been transferred thought fit to conclude the proceedings against them, There is nothing on the record to indicate that he did so and in my view, the orders in the two cases (References Nos. 60 and 61 of 1940) which have been referred to this Court by the learned Sessions Judge of Chittagong and the other order which is the subject-matter of Criminal Revision Case No. 437 of 1940 were legal. The entire cases relating to the alleged offences covered by the complaints were transferred to the learned Honorary Magistrates and the proper procedure was adopted by them in all these cases.

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Finally, as regards the cases which are the subject-matter of the References made by the learned Sessions Judge of Chittagong it has been argued that the References should be accepted having regard to the defects in the judgments to which reference is made in the first part of the learned Judge's letter.

As regards the case against Nurul Huq under section 427 of the Indian Penal Code, the learned Judge states that there is no finding in the judgment to the effect that the accused intended to cause loss to the complainant. He also refers to the insufficiency of the evidence. I have perused the judgment recorded by the learned Honorary Magistrate and it appears that the main finding is to the following terms: "I, therefore, hold that the accused party are not in possession of the eastern half of the R. S. plot 7323 as claimed by them. As to R. S. plot 7323 the defence has no answer to make and it is admittedly in possession of the complainant. The position, therefore, is that the complainant is in possession of both the R. S. plots 7323 and 7334 in full and upon the evidence adduced by the prosecution I hold that the accused party cut portions of those two plots and included the same in the Khal as newly opened and thereby caused mischief to the complainant to the extent of about Rs. 60 as alleged by the prosecution." In my view, this finding is sufficient. It is not necessary in a case of this sort to embody in the judgment the precise expressions which have been used in the section of the Indian Penal Code, which defines the offence of which the accused person is convicted. In this case it is clear that the learned Magistrate applied his mind to the evidence and in finding that the accused had caused mischief to the complainant he must have been satisfied that the ingredients of the offence defined in section 425 of the Indian Penal Code were present.

As regards the case under section 447 of the Indian Penal Code, the main ground as regards the merits of the case upon which the learned Judge recommends that the conviction should be set aside is that of inadequate evidence. Admittedly, a ground of this sort is not one on which this Court should interfere in revision. Appreciation of the evidence is a matter for the Court which deal with the facts of the case. It is clear that there were materials before the learned Magistrate, which if believed would justify the conviction of the accused under section 447 of the Indian Penal Code. No appeal lies against this decision and

the conviction is one with which I am not prepared to interfere.

The result is that References Nos. 60 and 61 of 1940 are rejected and the Rule issued in Criminal Revision Case No. 437 of 1940 is discharged.

References in Rev. Cases Nos. 60 and 61 rejected.
Rule in Cr. Rev. Case No. 437 discharged.

APPELLATE CIVIL.

Before Mr. Justice C. C. Biswas

HARAN CHARAN MANDAL AND OTHERS

v.

HIRALAL NASKAR AND OTHERS*

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Deposit of decretal amount by purchaser of a portion of a non-transferable occupancy holding—Statutory lien—Bengal Tenancy Act (VIII of 1885), Section 170, applicability of—Decree found to be not a rent decree as contemplated by chapter XIV of the Bengal Tenancy Act, effect of—Representation, principle of, Bengal Tenancy Act (IV of 1928) section 146A.

The fundamental condition for invoking the principle of representation under section 146A of the Bengal Tenancy Act, is that the landlord should join as defendants in his suit all the persons whose names are borne in the rent roll as tenants.

Where it is found that after the death of the original tenant, the jama devolved on his two sons and after the death of one of the sons it came to be held by two surviving sons K and H and in the rent suit K only was impleaded as *Sarbarahakar* :

Held that K alone was not capable of representing the entire interest in the jama and the decree passed was not a rent decree.

Hence there was no rent decree at all which could be executed under chapter XIV of the Bengal Tenancy Act to avert which the deposit under section 171 of the Bengal Tenancy Act could be made and as such the statutory lien as contemplated by the section could not be claimed.

If the sale was a sale under Chapter XIV of the Bengal Tenancy Act the plaintiff, who is the heir of the purchaser of half of the non-transferable occupancy holding would be competent to make the deposit under section 170 of the Bengal Tenancy Act or claim the rights of statutory mortgagee under section 171 of the Bengal Tenancy Act and would come within the category of

*Appeal from Appellate Decree No. 1569 of 1938, against the decree of A. F. M. Rahman, Esq., Additional District Judge of 24 Parganas, dated the 30th July, 1938, reversing that of K. L. Lahiry, Esq., Munsiff, Second Court, Alipore, 24 Parganas, dated the 10th September, 1937.

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persons whose interests are affected by the sale within the meaning of section 170 or section 171 or section 174 of the Bengal Tenancy Act.

Appeal by the Defendants.

Suit for declaration that the plaintiff has a statutory lien under section 171 of the Bengal Tenancy Act on the holding.

The material facts appear from the judgment.

Mr. Abinash Chandra Ghose for the Appellants.

Mr. Bhupendra Nath Das Gupta for the Respondents.

The judgment of the Court was as follows:

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The plaintiffs in this suit in effect claim a statutory lien on an occupancy holding by virtue of a payment made under section 171 of the Bengal Tenancy Act to prevent a sale of that holding under Chapter XIV of that Act. The suit was dismissed by the trial court, but on appeal the learned Additional District Judge of 24 Parganas has given the plaintiffs a decree virtually declaring their lien. The facts which it is necessary to state for the disposal of the appeal may be briefly set out:

The holding is said to have been a non-transferable occupancy holding, and admittedly it was held at one time by one Ramanath Mandal. Ramanath died, leaving three sons and heirs, Kshetra, Haran and Paran. Paran died unmarried leaving him surviving brothers as his only heirs and legal representatives. After Ramanath's death, therefore, the holding came in course of time to be represented by Kshetra and Haran. It is said that in the year 1902 while Paran was still living, Kshetra, purporting to act for himself and as guardian of his two minor brothers, sold away half of the holding to one Nabin. The landlord, however, refused to recognise this transfer. The present plaintiffs are heirs of Nabin, and they have been treated in these proceedings as unrecognised transferees of a portion of the holding.

In 1930 the landlord instituted a suit for arrears of rent of this holding for the years 1333 to 1336 B. S., and in due course obtained an *ex parte* decree. The decree was afterwards sought to be put into execution under Chapter XIV of the Bengal Tenancy Act, whereupon the present plaintiffs, claiming to be persons whose interests were likely to be affected by the sale, deposited the decretal amount with costs in court under section 170. By virtue of such deposit they claim to have acquired a statutory lien over the holding, and also to be entitled to possession of it. It is said that they did obtain actual possession as such mortgagees, and

in that capacity sued the tenants on the lands, defendants Nos. 4 to 6, for rent. The original tenants, the heirs of Ramanath being present defendants 1 to 3 also brought a suit for rent against the same tenants and obtained a decree. This led the plaintiffs to institute the present suit, whereby they asked for a declaration that the decree obtained by the defendants Nos. 1 to 3 against defendants Nos, 4 to 6 was fraudulent and collusive, and that in any case, it did not affect their interest as the holders of the statutory lien over the tenancy. The plaintiffs also asked for an injunction to restrain defendants Nos. 1 to 3 from executing their decree and further prayed for a refund of a certain sum of money which they are said to have already recovered from the tenants under the decree. The lower appellate court, while granting the plaintiffs' prayer for declaration, has refused the injunction and the refund.

This decree is resisted by defendants Nos. 1 to 3 on the ground that section 171 of the Bengal Tenancy Act has no application to this case. This position is sought to be supported on a two-fold basis. It is first contended that there was no rent decree at all which could be executed under chapter XIV of the Act, and to avert which a deposit could be made under section 171. Secondly, it is urged that in any event, the plaintiffs being in the position of co-sharer tenants, though not recognised by the landlord, were not entitled to make a deposit under section 170, or to claim the benefit of section 171 by virtue of such deposit. Either of these grounds, if made out against the plaintiffs, would be enough to dispose of their claim.

Having heard the learned Advocate on both sides, I have come to the conclusion that the decree which the landlord obtained for rent of the holding was not a rent decree at all, and that it would not, therefore, attract the operation of any of the sections of chapter XIV. The decree is Exhibit A in the case, and on the face of it, it purports to be directed against "Ramchandra and Nabin Chandra Naskar *Sarbarahakar* Sree Kshetra Mondal." The learned Advocate for the respondents contends that it was a decree against Kshetra Mandal alone, and that the names Ramchandra and Nabin Chandra Naskar were a mere description of the holding in respect of which Kshetra Mandal was said to be *Sarbarahakar*. The learned Additional District Judge says that there is no evidence to show who these persons Ramchandra and Nabin Chandra Naskar are, or whether they are names of living or dead persons, nor is there anything to show whether Ramchandra is a mistake for the name of the original tenant Ramanath, as the learned

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Munsif seems to think, or whether Nabin Chandra Naskar is the person whose heirs the present plaintiffs claim to be. There is, again no evidence to show when or how this tenancy, which admittedly belonged at one time to Ramanath, came to be held by Ramchandra and Nabin Chandra Naskar, as the learned Advocate for the appellants would have it. The materials on the record are in fact wholly insufficient to enable the court to come to any definite conclusion as to whether the decree was at all obtained against Kshetra Mandal as a tenant, much less as the sole tenant. Leaving aside speculation, and going upon the facts which have been found or are admitted, it seems, however, to be established beyond doubt that after the death of Ramanath, the original tenant, this Jama devolved on his sons, and that after the death of one of these sons, it came to be held by the two surviving sons, Kshetra and Haran. There can be no question that Haran did not lose his interest in this holding in the year 1930 when the landlord brought his rent suit. Haran was in fact joined as a defendant in a rent suit for a subsequent period. It follows, therefore, that at the date of the decree, Exhibit A, Haran, at all events, was a person who was interested as a tenant in the holding, the other person so interested being his brother Kshetra. Now, on the face of it, the decree, if we are to accept the interpretation which is put upon it by the learned Advocate for the respondents, is not against Kshetra as a tenant, but against him only as a Sarbarahakar. Even if this description is supposed to be wide enough to implead him in his capacity as a tenant, the fact still remains that Haran is not made a party to the suit. It is urged that although Haran was a person interested, he might not still have been joined as a defendant inasmuch as Kshetra alone was capable of representing, and did actually represent, the entire holding. This is nothing more than a mere assumption, and does not cease to be such because of the Dakhilas in which Kshetra is described as a Sarbarahakar. This much is clear that at the date the landlord brought the suit for rent in 1930, it could not be said that the landlord was unaware of the fact that there were other heirs of the original tenant still alive, who were, therefore, entitled to be made defendants in the suit, if the decree to be passed was to have the effect of a rent decree under Chapter XIV of the Bengal Tenancy Act.

Much reliance was placed on behalf of the respondents on a so-called finding of the learned Judge in the Court below to the effect that the tenancy was fully represented in the suit against

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Kshetra, It is, however, not possible to accept this as a proper or legal finding of fact which is binding on me in second appeal. For one thing it purports to be based on a view expressed by the learned Judge which is manifestly untenable. This is what he says:

"It does not appear that any one else (besides Kshetra) was recognised as tenant when the rent suit in question was instituted. Nor does it appear that the landlord was bound to recognise any one else as a tenant at that stage."

This wholly ignores the existence of Haran as a co-heir with Kshetra, and, in my opinion, it is quite enough to vitiate the finding on which the learned Advocate relies. Reference was made by him to a decision of Sir Lawrence Jenkins in *Chamatkari Dasi* v. *Triguna Nath Sardar* (1) in support of the view that it is open to a landlord to implead only one of a number of tenants in a rent suit without losing his rights under Chapter XIV, when that tenant is put forward by the rest as their representative. It is enough for me to point out that the proposition laid down in this case rests on a foundation which no longer exists by virtue of later amendments of the Act, and particularly the enactment of Section 146A. Apart from this, it is worthy of note that this is contrary to the spirit, if not the letter, of the decision of the Full Bench in *Jagan Mohan Sarkar* v. *Brojendra Kumar Chakravarty* (2). In the present case, it is not shown that the landlord had actually joined as defendants in his suit all the persons whose names were borne in his rent roll as tenants. The fundamental condition for invoking the principle of representation under Section 146A was thus lacking. And in that view, the learned Judge, in my opinion, was wholly wrong in proceeding on the basis that the entire body of co-sharer tenants had been represented by Kshetra. The first ground urged by the appellants must, therefore, succeed, and as I have said, this is sufficient to dispose of the suit.

As the other point has, however, been argued by the learned Advocate for the appellants, I might just as well indicate my opinion, although it is not necessary for the purposes of my decision to express any final conclusion. I do not accept his view that the plaintiffs, assuming that the sale of the holding was a sale under Chapter XIV of the Act, were not competent to make a deposit under Section 170 or claim the rights of statutory mortgagees under Section 171. I see no reason why, treating them

(1) (1913) 17 C. W. N. 833.

(2) (1925) I. L. R. 53 Calc. 197; 42 C. L. J. 232.

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as unrecognised transferees of a non-transferable holding, the transfer having taken place at a time when such holdings had not been made transferable by statute, they should not be held to come within the words "persons whose interests are affected by the sale." The Full Bench case of *Dayamayi* v. *Ananda Mohan Roy Chowdhury* (1) and the Special Bench case of *Chandra Binode Kundu* v. *Ala Bux Dewan* (2) leave no doubt that a purchaser of a non-transferable occupancy holding, either in whole or in part, does acquire an interest in the holding which is operative against the raiyat and against the rest of the world except only the non-assenting landlord. It is also clear that on the sale of the holding in execution of a rent decree, the interest of such a person would be extinguished. That being so, it is difficult to see why the plaintiffs cannot be said to come within the category of persons whose interests are affected by the sale within the meaning of Section 170 or 171 as well as of Section 174 in which the same words are used, I may refer in this connection to the decision of Mr. Justice Mitter in a case *Dayaluddin Sirkar* v. *Azimuddin Mondal* (3) where the same view has been held regarding the use of this expression in Section 174. Mr. Ghose on behalf of the appellants argued that the remedy of persons in the position of the plaintiffs really lay in a suit for contribution. Whether or not they can claim contribution is a somewhat debatable point which it is not necessary for me to discuss here; but it is neither inequitable nor inconvenient to give such persons a statutory lien over the property which they save by their payment, so that they can recover from the property itself, if not from the tenant personally for whose benefit they profess to act, You may not thrust a benefit on an unwilling party, but you may fairly hold the property itself liable to the extent to which you have contributed to save it. However, I must resist the temptation of being enticed into a discussion of this interesting topic which might possibly be reserved for a more suitable occasion.

The result is that this appeal succeeds on the first ground I have indicated, and the judgment and decree of the learned Additional District Judge must, therefore, be set aside and those of the learned Munsif, restored. The appellant will be entitled to the costs of this Court and of the lower appellate Court.

P. R. *Appeal allowed.*

(1) (1914) I. L. R. 42 Calc. 172; 20 C. L. J. 52.
(2) (1920) I. L. R. 48 Calc. 184; 31 C. L. J. 510.
(3) (1936) 41 C. W. N. 255.

Before Mr. Justice R. F. Lodge

SM. ANNAPURNA DASI *alias* ANNAPURNA ROY

v.

BAZLEY KARIM FAZLEY MOULA AND OTHERS.*

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August, 19.

Auction sale—Balance of purchase money not deposited—Sale becomes a nullity—Purchaser, if forfeits all rights to property.

A purchaser at an auction sale who makes default in payment of balance of purchase money forfeits all claim to the property and the sale at which the purchase was made is a nullity : *Munshi Md. Ali Meah v. Kibria Khatun* (1) followed.

Appeal by the Defendant.

Suit for declaration of title and recovery of possession.

The material facts will appear from the judgment.

Mr. Gopendra Nath Das for the Appellant.

Mr. Satindra Nath Mookerjee for the Respondents.

Mr. Ramendra Chandra Roy for the Deputy Registrar.

The judgment of the Court was as follows :

This appeal arises out of a suit for declaration of title to certain lands and for recovery of possession of the same. *August, 19.*

The material facts briefly are as follows : The plaintiff in the suit and the defendant No. 1 jointly obtained a decree for rent against one Khatun Bibi in the presence of other pro-forma defendants in the year 1931. The defendant No. 1 was found entitled to Rs. 8 odd and the plaintiff to Rs. 15 in that decree. In the year 1933 the defendant No. 1 took out execution of that decree, had the property of the judgment-debtor put to sale and purchased it on the 27th November, 1933. At the time of the sale, the defendant No. 1 applied to set off his decretal amount against the purchase money. This was allowed. Thereafter apparently through oversight, the balance of the purchase money was not deposited by the defendant No. 1. But inspite of his failure, the sale was confirmed. The bid made by the defendant No. 1 at which the sale was confirmed was for Rs. 35-8-6 pies and his claim under the decree was only about Rs. 16. The defendant No. 1

*Appeal from Appellate Decree No. 1694 of 1938, against the decree of Benoy Bhusan Sen, Esq., Subordinate Judge, Birbhum, dated the 11th August, 1938, affirming that of Nagendra Nath Mukherji, Esq , Munsiff, First Court, Rampurhat, dated the 30th March, 1938.

(1) (1910-11) 15 C. W. N. 350.

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appears to have taken possession after his purchase. In the following year, the plaintiff took out execution proceedings of the same decree, had the property put to sale and on the 10th July, 1934, purchased the property. Thereafter the plaintiff instituted the present suit for declaration of his title to the lands and for recovery of possession and for mesne profits asserting that he had been dispossessed by the defendant No. 1 in the year, 1935. Both the Courts below decreed the plaintiff's suit. In the original Court it was held that the decree was a rent decree and that the sale at which the plaintiff purchased had the effect of a rent sale, whereas the sale at which the defendant No. 1 purchased had the effect only of a money sale. In the lower appellate Court it was found that the decree itself had the effect only of a money decree and that both sales in execution had the effect of money sales. The lower appellate Court held that the defendant No. 1 having failed to deposit the balance of the purchase money, her purchase in 1933, was a nullity and, therefore, the plaintiff was entitled to succeed. Against that decision, the defendant No. 1 has appealed.

On behalf of the appellant it has been pointed out that this question was not considered in the Court of first instance and it has been argued that the lower appellate Court ought not to have decreed the plaintiff's suit on this ground. It is true that there is no discussion on this point in the judgment of the learned Munsif: but it appears in paragraph 4 of the plaint that the case was clearly made out therein that the defendant No. 1 had failed to deposit the balance of the purchase money. There is no denial of the assertion in the written statement and the facts necessary to be established before this question can be decided must be, therefore, taken to be admitted facts. Such being the case, the lower appellate Court was justified in considering this question and giving a decision thereon even though the question had not been agitated in the Court of first instance. It has been argued that under the amended rule 86 of Order XXI, the Court may, if it thinks fit, refrain from forfeiting the deposit made under rule 85 and that, therefore, the effect of the failure to deposit the balance of the purchase money is that the sale is not a nullity and that the property is a security for payment of the balance of the purchase money. The only case on this point to which my attention has been drawn is the case of *Munshi Md. Ali Meah* v. *Kibria Khatun* (1), where it was held under

(1) (1910-11) 15 C. W. N. 035.

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the Code of 1882 that where the balance of the purchase money is not paid, the sale is a nullity and not merely an irregular sale for which remedy may be had by an application under section 244 or 311 of that Code. The learned Advocate for the appellants has contended that under the old Code, the Court had no option and was bound to forfeit the deposit made under section 306 of the Code and that consequently when default was made for payment of the balance, it must be taken that in law no payment whatever had been made for the property and that consequently the sale was a nullity. It is true that rule 86 has been amended and the words "the deposit .... shall be forfeited to Government" have been replaced by the words "the deposit may, if the Court thinks fit, ... be forfeited to the Government." But the concluding words of the rule have remained unaltered and that part lays down that the defaulting purchaser shall forfeit all claim to the property. It follows that whether the deposit made under rule 85 be forfeited or not, the purchaser shall forfeit all claim to the property if he makes default of payment of the balance of the purchase money. In my opinion, the amendment of the rule does not make any alteration in the law regarding the effect of the failure to deposit the balance of the purchase money and the decision in the case of *Munshi Md. Ali Meah* v. *Kibria Khatun* (1) referred to above must be taken to be still good law. Following that decision I hold that the lower appellate Court was right in holding that the sale at which the defendant No. 1 purchased was a nullity and consequently he was right in decreeing the plaintiff's suit as he did.

The appeal, accordingly, fails and must be dismissed with costs payable to the plaintiff respondent No. 1.

P. R. *Appeal dismissed.*

(1) (1910-11) 15 C. W. N. 350.

Before Mr. Justice A. N. Sen.

ATUL KRISHNA BOSE AND OTHERS

v.

ZAHED MONDAL AND OTHERS

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1940.

July, 12.
August, 12.

Lease—Compromise decree in a suit for khas possession creating the lease—Registration of such lease, if compulsory—Indian Registration Act (XVI of 1908), section 17 (1) (d)—Admissibility in evidence—Rate of rent, if can be proved otherwise than by the written lease—Indian Evidence Act (I of 1872), section 91—Bengal Tenancy Act (VIII of 1885), section 51, presumption.

The plaintiffs purchased the superior interest at a rent sale and annulled all incumbrances by a notice under section 167 of the Bengal Tenancy Act. A suit for khas possession was brought against the defendants which was decreed on compromise. By the terms of the compromise a lease was granted to the defendants reserving a rental. The plaintiffs now sued the defendants for recovery of arrears of rent :

Held that the compromise decree being in the nature of a new lease, is compulsorily registrable under section 17(1) (d) of the Indian Registration Act and was therefore not admissible in evidence to prove the rent of the tenancy. Rate of rent being one of the terms of the tenancy, it cannot be proved otherwise than by the written lease as it will be hit by section 91 of the Indian Evidence Act.

There cannot be any scope for the presumption under section 51 of the Bengal Tenancy Act of the terms of a lease in a case where there is a written lease setting forth the terms.

Appeal by the Plaintiffs.

Suit for rent.

The material facts will appear from the judgment.

Messrs. Hiralal Chakrabarty, Krishna Kamal Moitra and *Rabindra Nath Bhattacharji* for the Appellants.

Messrs. Kshitindra Nath Bose, and *Upendra Kumar Roy (for Deputy Registrar)* for the Respondents.

C. A. V.

The judgment of the Court was as follows :

This appeal arises out of a suit for rent, the plaintiffs being the appellants. Their case is that they purchased the superior

*Appeal from Appellate Decree No. 1353 of 1938, against the decree of S. Sen, Esq., District Judge, Khulna, dated the 29th April, 1938, modifying that of Moulvi Sherajuddin Ahmed, Munsiff, 3rd Court, Satkhira (Khulna), dated the 30th November, 1937.

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interest at a rent sale and annulled all incumbrances by a notice under section 167 of the Bengal Tenancy Act. They then brought a suit being Title Suit No. 136 of 1923 for Khas possession against the defendants. The suit was decreed on compromise. By the terms of the compromise a lease was granted to the defendants at a rental of Rs. 16 per annum. The defendants have fallen into arrear and the plaintiffs accordingly sue for recovery of rent.

The defence taken is that the original rent of the tenancy was Rs. 6-6, that the compromise decree was obtained by fraud and that the enhancement of rent from Rs. 6-6 to Rs. 16 was illegal by reason of the terms of section 29 of the Bengal Tenancy Act. The Munsiff negatived this defence and gave the plaintiffs a decree. The defendants appealed. The learned District Judge has found that no fraud was practised but he held that the lease was inadmissible in evidence as it was not registered and that therefore the plaintiffs could not claim rent on the basis of the lease. He held also that if the present lease be treated as the continuation of the old one then the enhancement of the rent from Rs. 6-6 to Rs. 16 was illegal. He allowed the plaintiffs rent at the admitted rate of Rs. 6-6 per annum. The plaintiffs now appeal.

It is accepted that the compromise decree was not obtained by fraud and that the rent originally paid by the defendants was Rs. 6-6. The decree is not registered. The first question for determination is whether it is a document which must be registered.

The contention of the appellant is that decree does not create a lease but that it is a document which merely recognises or declares the existence of the old tenancy and is therefore not compulsorily registrable under section 17 of the Indian Registration Act. I have carefully considered the document and have no hesitation in holding that by the compromise decree a new lease is created. The old tenancy was extinguished by the notice under section 167 of the Bengal Tenancy Act annulling encumbrances. The plaintiffs sued the defendant after annulling his tenancy on the footing that he was a trespasser. The suit was compromised by the defendants taking a fresh lease. The words used are "Jama Bandobasta Korea loyeelam" (I hereby take a lease). The compromise decree is not the recognition of an old lease but it is a new lease. Now section 17 (1) d of the Indian Registration Act says that a lease from year to year or

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for any time exceeding one year or reserving a yearly rental must be registered. The compromise decree is a document of this description and it is compulsorily registrable.

It is true that section 17 (2) VI exempts a decree or order of Court from registration but the exemption does not extend to decrees embodying leases. This is perfectly clear from the wording of Sub-section (2) which expressly limits the operation of the exemption therein contained to documents dealt with in Clauses (b) and (c) of Sub-section (1). Sub-clause (d) of Sub-section (1) which deals with leases is excluded from the operation of Sub-section (2). In this connection I would refer to the case of *Nazar Ali v. Indra Kumar Sutar* (1).

Now this decree being compulsorily registrable under section 17 of the Indian Registration Act and not having been registered, it cannot affect the immovable property comprised therein or be received as evidence of any transaction affecting such property. This is the effect of section 49 of the Registration Act. The plaintiffs cannot therefore rely upon this compromise decree for proving the rent of the tenancy.

The next question for decision is whether the rate of rent can be proved *aliunde*. It was argued by learned Advocate for the appellant that rent at the rate claimed has been paid and that there are counterfoil receipts to prove this. He wished to prove the rate of rent by these receipts. In my opinion Section 91 of the Indian Evidence Act stands in the way of any other evidence being given of the rate of rent. The rate of rent is one of the terms of the lease. Section 91 says that when the terms of a contract or any grant or other disposition of property are reduced to the form of a document no evidence shall be given of the proof of such terms, grant or other disposition except the document itself. The terms of Section 91 are quite explicit in their prohibition of the proof of the terms of the lease *aliunde* and I hold that no other evidence could have been given to prove the rate of rent in this suit which is based on an unregistered lease except the lease itself and that Section 49 of the Registration Act prevents the document being put in evidence. The result is that the plaintiffs cannot prove the rate of rent. To hold otherwise would be to render nugatory the provisions of the Registration Act and of Section 91 of the Evidence Act. A similar question arose and was considered by the Judicial Committee of the Privy

(1) (1928) I. L. R. 56 Calc. 427.

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Council in the case of *M. Subramonian and another* v. *M. L. R. M. Lutchman and others* (1). The case related to a mortgage by deposit of title deeds. There was a writing accompanying the deposit. Their Lordships held that the writing should have been registered as it constituted the bargain between the parties and was not merely a memorandum of a contract already completed. The writing was not registered and was held to be inadmissible in evidence. It was contended that oral evidence may be given of the terms of the mortgage. The contention was repelled by their Lordships who laid down that as the writing could not be proved no oral evidence of the terms of the contract could be given. In doing so they quoted the words of Couch. C. J, in the case of *Kedarnath Dutt* v. *Shamloll Khettry* (2) which were as follows: "The rule with regard to writings is that oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing. And the reason is that the writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement." They also referred with approval to the words of Lord Cairns in the case of *Shaw* v. *Foster* (3) and said "In the words of Lord Cairns in the leading case of *Shaw* v. *Foster* (3), 'although it is a well-established rule of equity that a deposit of a document of title without more, without writing, or without word of month, will create in equity a charge upon the property referred to, I apprehend that that general rule will not apply when yon have a deposit accompanied by an actual written charge. In that case you must refer to the terms of the wrltten document, and any implication that might be raised, supposing there was no document, is put out of the case and reduced to silence by the documents by which alone you must be governed'." I must hold therefore that the plaintiffs cannot give oral testimony of the rate of rent fixed by the unregistered lease.

Learned Advocate for the appellants next relied upon the terms of Section 51 of the Bengal Tenancy Act which are as follows: "If a question arises as to the amount of a tenant's rent or the conditions under which he holds in any agricultural year, he shall be presumed, until the contrary is shown, to hold at the same rent and under the same conditions as in the last preceding agricultural year." He argued that he was able to prove the rent

(1) (1922) L. R. 50 I. A. 77; I. L. R. 50 Calc. 338; 38 C. L. J. 41.
(2) (1873) 11 B. L. R. 405.
(3) (1872) L. R. 5 H. L. 321 (341).

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paid in the previous years and that he was therefore entitled to the presumption that this was the rent payable. All I need say about this argument is that there cannot be scope for any presumption of the terms of a lease in a case where there is a written lease setting forth the terms.

The decree of the lower appellate Court giving the plaintiffs rent at the rate admitted by the defendants must therefore be upheld. It was contended by the respondents that even if the lease could be given in evidence it would be inoperative so far as the increase of the rent is concerned inasmuch as it offends against the provisions of Section 29 of the Bengal Tenancy Act. In view of my decision that the lease cannot be proved and that no oral or other evidence can be given of the rate of rent, it is unnecessary to decide this question.

The appeal is dismissed with costs.

Leave to appeal under Section 15 of the Letters Patent is refused.

P. R. *Appeal dismissed.*

PRIVY COUNCIL.

PRESENT *Lord Thankerton, Sir George Rankin and Sir Philip Macdonell.*

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May, 23

SETH KISHORI LAL AND ANOTHER

v.

BHOWANI SHANKAR AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT ALLAHABAD.]

Mortgage suit—Recital in deed incorrect—Amount borrowed to pay off ancestral debt—Amount mentioned in the deed not correct—Burden of proof—Compliance with law—Liability of sons of mortgagors.

The suit was brought upon a registered mortgage deed executed by three persons B, M and S as mortgagors, B purporting to execute on behalf of himself and his minor son and M on behalf of himself and his four minor sons. B and M were brothers and S was their nephew, son of their deceased brother.

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The mortgagees claimed the usual relief under Order 34 of the Code of Civil Procedure—enforcement of the mortgage by sale of the mortgaged property.

It was found that the amount lent was Rs. 58,541, out of which Rs. 27,891 was applied by the plaintiffs in discharge of antecedent debts and the balance of Rs. 30,649 was paid to the mortgagors in cash. This last amount was required for the purpose of starting the business by starting a sugar machine and for household purposes. The High Court came to the conclusion that out of Rs 27,891, Rs. 16,299 was shown to be due from three defendants B, M and S jointly and the joint estate was validly mortgaged for that sum. The balance Rs. 11,592 was incurred by one or other or by two, of the three defendants. No legal necessity has been proved as regards this balance :

Held, that no judgment could be passed against the sons of three defendants as no such relief was asked for in either Court, and as the suit as framed being a suit upon the mortgage, it was unnecessary to consider the extent of the plaintiffs' rights in execution of the personal decree against the fathers.

Their Lordships did not permit the suit to be recast at the late stage and declined to entertain the new ground of claim put forward against the sons for the first time before their Lordships.

That the money required for starting a business being not an ancestral business was not for legal necessity.

The burden is upon the mortgagee to establish compliance with the conditions under which the Hindu law permits the interest of the minor members to be taken from them.

The plaintiffs were given a money decree against the first three defendants for Rs. 58,541 with interest : of this Rs. 16,299 was a valid charge on the family estate and a preliminary decree for sale was made in respect thereof.

Privy Council Appeal No. 84 of 1938 against the judgment and decree of the High Court, Allahabad, dated the 24th November, 1936, reversing the judgment of the Subordinate Judge of Etah.

The material facts appear in their Lordships' judgment.

Rewcastle, K. C. and *Hyam* for the Appellants.

None appeared for the Respondents.

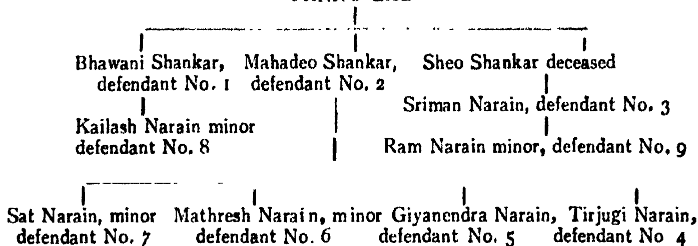
The judgment of their Lordships was delivered by

Sir George Rankin : This appeal is brought by the plaintiffs from a decree of the High Court at Allahabad, dated 24th November, 1936. The defendants have not been represented at the hearing of the appeal, but Mr. Rewcastle and Mr. Hyam for the appellants have carefully laid before the Board all the material considerations. *May, 23.*

The suit was brought on the 21st March, 1932, in the Court of the Subordinate Judge of Etah, upon a registered mortgage

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dated 1st September, 1926, and claimed the usual relief under Order 34, Civil Procedure Code—enforcement of the mortgage by sale of the mortgaged property. The mortgage deed was in favour of the plaintiffs. It was executed by three persons as mortgagors—Bhawani, Mahadeo, and Sriman Narain—but Bhawani purported to execute on behalf of himself and his minor son Kailash Narain ; while Mahadeo purported to execute on behalf of himself and his four minor sons—Tirjugi, Giyanendra, Mathresh and Sat Narain. As will be seen from the pedigree hereunder, Bhawani and Mahadeo were brothers and Sriman Narain was their nephew, being the son of their deceased brother Sheo Shankar.



By the terms of the deed it was declared that the mortgagors were joint ; and the property mortgaged was in fact the zemindari property of the family. The sum borrowed was stated as Rs. 60, 000 and it was recited that this sum was borrowed "for the purpose of paying the debt, detailed below, which we the executants have jointly taken for lawful necessity, for carrying on a business and other necessities, and by which all of us the executants, whoever may have borrowed the sum, have been benefited and for payment of which all of us, the executants, are liable to pay." It was further stated that "we the executants require money for carrying on our business also and also for purposes of starting the business by starting a sugar machine (*khandsal*) carrying on a business and for household purposes for the benefit of our family." Interest was at 9 per cent. per annum with yearly rests.

In the body of the mortgage deed 16 different sums amounting in all to Rs. 50, 491 were mentioned as having been left with the plaintiffs out of the mortgage money for payment of decretal and other debts therein described. Apart from the sum of Rs. 458-7-3 which went to pay the stamp and registration fees the remaining item was a sum of Rs. 9, 050 which the mortgagors purported

to have taken in cash "for carrying on the business of *khandsal* and setting up a sugar machine as well as for trade and other family necessities."

The plaintiffs suing to enforce this mortgage deed impleaded all the members of the family as well as certain transferees from them who need not be further mentioned. The first three defendants were Bhawani, Mahadeo and Sriman Narain. There being some difficulty about the appointment of a guardian *ad litem* for the minors Kailash and Ram Narain, these two were before the trial discharged from the suit at the plaintiffs' instance on 6th August, 1932. It was conceded by the defendants at the trial that the three branches of the family were joint and it is not disputed that Mahadeo was the *karta*. The learned Subordinate Judge thought that since two of the minor members of the family were no longer parties to the suit it was not open to him to give a mortgage decree against joint family property, and that the only relief which he could grant was a money decree against the three defendants who had been of full age at the date of the deed—viz., Bhawani, Mahadeo and Sriman Narain. This view was overruled by the High Court who pointed out that in such a suit a minor member of a Hindu joint family is sufficiently represented by the *karta*.

Leaving on one side a question whether the plaintiffs were entitled to a certain credit in respect of a motor car, both Courts have found that the amount lent was Rs. 58, 541 and not Rs. 60, 000; that Rs. 27, 891 was applied by the plaintiffs in discharge of antecedent debts and that the balance of Rs. 30, 649 was paid to the mortgagors in cash. It was objected in the High Court—though the point does not appear to have been taken before the trial Judge—that the sum of Rs. 27, 891 expended upon antecedent debts was not wholly expended upon antecedent debts which were joint, some being, so far as appeared in evidence, the individual debts of defendants 1, 2 or 3. The High Court, having examined the evidence, came to the conclusion that Rs. 16, 299 was shown to be due from these three jointly and were prepared to regard the joint estate as validly mortgaged for that sum. The balance, Rs. 11, 592, was only shown to have been incurred by one or other, or by two, of the first three defendants. A Full Bench in *Chiranji Lal* v. *Bankey Lal* (1), had held that "it is the privilege of the father alone to burden the

(1) (1933) I. L. R. 55 All. 370.

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family estate by a mortgage by discharging an antecedent debt which must be a debt of his own. A manager of the family who is not the father cannot bind the estate merely by discharging a pre-existing debt of the family." Hence, apart from proof of legal necessity—another ground of claim altogether—the High Court held that the joint estate was not bound by the mortgage deed save to the extent of Rs. 16, 299. It is not pretended that legal necessity has been proved as regards the balance of the sum of Rs. 27, 891.

In the result the High Court gave the plaintiffs a money decree against the first three defendants for Rs. 58, 541 with interest: of this Rs. 16, 299 and no more was held to be a valid charge on the family estate and a preliminary decree for sale was made in respect thereof.

This decision is complained of by the plaintiffs in three respects. In the first place appeal is made to the principle of Hindu law that where sons are joint with their father they are liable to pay debts contracted by him for his own personal benefit provided that the debts are not immoral. It is said that judgment should have been given against the sons of each of the first three defendants in the present suit. No such relief was asked for before either Court in India and the suit as framed was a suit upon the mortgage of 1st September, 1926. It is not necessary to consider the extent of the plaintiffs' rights in execution of the personal decree against the fathers. Their Lordships cannot permit the suit to be recast at this late stage and must decline to entertain the new ground of claim now put forward for the first time.

The second contention of the plaintiffs is that their Lordships should hold the sum of Rs. 30, 649 paid to the mortgagors to have been raised for the benefit of the joint estate. This case would appear to rest entirely on the suggestion that the money was required for the *khandsal* business which—as held by both Courts in India—was not an ancestral business. In the High Court's judgment it is said, "Dr. Katju, who argued this case very fully on behalf of the appellants, had to concede that there was no evidence upon which we could hold that the cash advanced was for legal necessity and that the plaintiff-appellants had not discharged the onus which the law casts upon them. That being so it is clear that a mortgage decree cannot be passed in respect of this portion of the advance—viz., Rs. 30,649-8-0." It was suggested before the Board that it was still open to the plaintiffs

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to seek a mortgage decree for this sum on the ground that it was borrowed for "the benefit of the estate" as distinct from "legal necessity," but on the facts of the case their Lordships regard this as but another and more difficult form of the same contention that was abandoned as hopeless in the High Court.

Lastly it was said that the whole sum of Rs. 27, 891 expended upon antecedent debts should have been treated as charged upon the joint estate by the mortgage and not only the sum of Rs. 16,299 found to have been jointly due by the first three defendants. Their Lordships were not asked to question the law applied to the matter in the High Court but were asked to hold that the whole sum of Rs. 27, 891 was jointly due, since the individual debtor may well have incurred the obligation on behalf of the heads of the other branches as well as on his own account. It was said that the recital already quoted from the mortgage deed throws the burden upon the defendants of disputing that all the executants were liable for all these debts. As against the minor members of the family into whose mouth this recital was put by the draftsman of the mortgage deed, their Lordships can attach no such high value to it. The burden remains heavily upon the mortgagee to establish compliance with the conditions under which the Hindu law permits the interest of the minor members to be taken from them. In the present case the recital read as a whole is proved to have been untrue—untrue to the prejudice of the minors—in important particulars regarding the antecedent debts. If the plaintiffs felt that they had been taken by surprise in the High Court they might have asked for an opportunity to call further evidence to prove the joint character of the debts in question. They do not appear to have done so and their Lordships see no reason to disturb the findings of the High Court which appear to be accurate.

Their Lordships are much obliged to the appellants' learned counsel for their arguments, which have been both fair and clear, but they must humbly advise His Majesty that this appeal should be dismissed. As the respondents have not appeared there will be no order respecting costs.

Barrow, Rogers & Nevill : Solicitors for the Appellants.

A. T. M. *Appeal dismisssed.*

FEDERAL COURT.

PRESENT: *Sir Maurice Gwyer, Knight, Chief Justice, Mr. Justice S. M. Sulaiman and Mr. Justice S. Varadachariar.*

F. C.
1940.
March, 18,

RAJA PRITHWI CHAND LALL CHOUDHRY

v.

RAI BAHADUR SUKHRAJ RAI AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT PATNA.]

Certificate—Certificate not granted at the time judgment was pronounced by High Court—Party, duty of—Bihar Money lenders (Regulation of Transactions) Act (VII of 1939), Sec. 8- Statement of fact by Council.

When a certificate had not been granted at the time the judgment was pronounced by High Court, the party interested might bring the matter to the notice of the Court by an application but that will not be an application under Order 45 of the Code of Civil Procedure. Rule 17 which was added to Order 45 by the Government of India (Adaptation of Indian Laws) Order, 1937, assumes that a certificate under Section 205 of the Constitution Act has already been given.

Where for the first time in the Federal Court the appellant sought to argue about the applicability of Section 8 of the Bihar Money lenders (Regulation of Transactions) Act, 1939, and the appellant prayed for the amendment of petition of appeal which did not even refer to that section :

Held, that the Federal Court would not for the first time exercise a discretion which the High Court could have been, but was not, asked to exercise under Section 12 of the Bihar Money Lenders Act, 1938.

When Counsel take on themselves the responsibility of making statements of fact to the Court, the Court is entitled to assume that those statements are true in every particular, so that it may implicitly rely upon them. This rule admits of no qualification. It is an honourable obligation of the Bar and of great value in the administration of justice.

Federal Court Case No. 15 of 1939.

Appeal by the Defendant.

The material facts appear from the judgment.

Messrs Rajeshwari Prasad, Raghbir Singh, A. C. S. Chari and *A. H. Fakhruddin,* (Advocates of the Federal Court), instructed by *Mr. G. Sahay,* Agent for the Appellant.

Mr. Kripa Narain (Senior Advocate, Federal Court) with *Mr. Radhe Mohan Lal* (Advocate, Federal Court), instructed by *Mr. Tarachand Brijmohanlal,* Agent, for the Respondents.

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The judgment of the Court was as follow :

This appeal must be dismissed. It appears that in the proceedings before the High Court the point which the counsel for the appellant now seeks to raise was never mentioned and it is not clear on what grounds the certificate under Section 205 of the Constitution Act was obtained from the High Court. The application made under Order XLV of the Civil Procedure Code to the High Court was quite irregular, because rule 17, which has been added to Order XLV by the Government of India (Adaptation of Indian Laws) Order, 1937, assumes that a certificate under Section 205 of the Constitution Act has already been given. No such certificate was in existence when the application was made. It may be that where a certificate had not been granted at the time the judgment was pronounced, the party interested might bring the matter to the notice of the Court by an application, but that will not be an application under Order XLV. We do not know what question of interpretation of the Constitution Act was in the opinion of the High Court involved in the case and the record throws no light upon the point.

Counsel for the appellant told us that the only point which he desired to argue was the application of Section 8 of the new Bihar Act of 1939 (Act VII of 1939). It is the first time in any Court that the appellant has sought to make such a submission, either under Section 8 of the Act of 1939 or under the corresponding section of the earlier Act of 1938. In his petition of appeal he does not even refer to that section, but to different sections altogether. We were told that this was a printer's error, but we have seen a typescript copy of the petition, with references to those sections inserted in manuscript and initialled by the appellant's agent. We were asked to allow the petition to be amended, but in the circumstances we see no reason for allowing any amendment; and even if we had done so, we should certainly have rejected a request that we should exercise for the first time a discretion which the High Court could have been, but was not, asked to exercise under Section 12 of the earlier Act, a section which, so far as we are aware, the High Court has not at any time held to be void, as it has held other sections of the same Act to be.

We have one other observation to make. Counsel for the appellant, in answer to questions put to him by the Court, made what purported to be statements of fact relating to matters arising out of the litigation, which on further enquiry were found to be no more than surmises or guesses on his part. When counsel

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take on themselves the responsibility of making statements of fact to the Court, the Court is entitled to assume that those statements are true in every particular, so that it may implicitly rely upon them. This is a rule which admits of no qualification. It is an honourable obligation of the Bar and of great value in the administration of justice: and we trust that we shall not have occasion to draw attention to it again.

The appeal is dismissed with costs.

A. T. M. *Appeal dismissed.*

PRESENT: *Sir Maurice Gwyer, Knight, Chief Justice, Mr. Justice S. M. Sulaiman and Mr. Justice S. Varadachariar.*

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BIRENDRA PRASAD SUKUL AND OTHERS

v.

SURENDRA PRASAD SUKUL AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT PATNA.]

Interest—Bihar Money lenders (Regulation of Transactions) Act (VII of 1939) Sec. 7—Loan—Amount mentioned in the mortgage deed—Claim in the plaint.

Section 7 of the Bihar Money-lenders (Regulation of Transactions) Act, 1939, refers to the claim brought against the particular defendant who is sued, and the amount which is due from him alone and is the subject matter of the claim.

A mortgage deed was executed by B and D for Rs. 10,000 carrying interest at 8 annas per cent per mensem compounded every second year. The present plaintiffs were entitled by inheritance to 2-6ths share in the morgage deed. They had discharged D and his sons from liability and sued to enforce the mortgage against the half share of B and his sons and claimed Rs. 12,500. with interest:

Held, that the plaintiffs were entitled to have a decree for the principal sum of Rs. 12,500 and total interest Rs. 12,500 up to the date of the suit plus interest *pendente lite* and future interest. The maximum limit for the award of interest was Rs. 12,500 and not Rs. 100,000.

Federal Court Appeal No. 12 of 1939.

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Birendra Prasad Sukul v. Surendra Prasad Sukul.

Appeal by the Mortgagors.

Suit to enforce a mortgage.

The material fact appears from the judgment.

Mr. Rajeshwari Prasad (Advocate, Federal Court) instructed by *Mr. G. Sahay*, Agent, for the Appellants.

Mr. Raghbir Singh (Advocate, Federal Court) with *Mr. P. P. Varma* (Advocate, Patna High Court), instructed by *Mr. T. K. Prasad*, Agent, for the Respondents.

The following judgments were delivered :

March, 18.

Sulaiman, J.—This is a mortgagors' appeal arising out of a suit brought to enforce a mortgage, dated the 1st January, 1915, executed by Debindra Prasad Sukul, defendant No. 4, and Birendra Prasad Sukul, defendants No. 1 for Rs. 100,000 carrying interest at 0-8-0 per cent. per mensem compounded every second year. The present plaintiffs were by inheritance entitled to only 2/6th share in the mortgage deed. The rest has gone to the defendants. The Courts below have found that there was a legal necessity for Rs. 25,000 only which represented an unpaid purchase money for properties taken by both, while Rs. 25,000 went into the pocket of Debindra alone. The plaintiffs had discharged Debindra Prasad and his sons from all liability and sued to enforce the mortgage against the half share of Birendra and his sons. The amount claimed in the plaint was 1/6th of Rs. 100,000 plus corresponding interest. The Courts below have passed a decree for Rs. 12,500 (1/6th of Rs. 75,000) and interest at contract rate up to the date fixed for payment in the decree. The defendants' plea that Section 11 of the Bihar Money-lenders Act, 1938, should be applied was rejected by the High Court on the ground that the section had been held by a Full Bench to be void.

Section 11 of the old Act has now been replaced by Section 7 of the new Act (Act VII of 1939), the applicability of which is governed by our Ruling in Case No. 9 of 1939 (*Surendra Prosad Narain Singh* v. *Sri Gajadhor Prosad Sahu Trust Estate and others*) (1), decided to-day.

If the principal sum due from the defendants-appellants were taken to be Rs. 12,500, and if the principle of Section 7 were to apply and the plaintiffs are to be given interest up to the date of the suit, not exceeding the principal sum, then the total amount due up to the 26th April, 1929, when the suit was brought would be Rs. 25,000 only. According to the accounts as appended to the decree of the first suit, the amount of principal and interest calcu-

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lated up to that date exceeds Rs. 28,000. It is contended on behalf of the appellants that this amount should be reduced to Rs. 25,000.

The learned Advocate for the plaintiffs, however, contends before us that as the sum of Rs. 100,000 is mentioned in the mortgage deed, the maximum limit for the award of interest is that figure, and therefore the amount awarded by the Courts below, being well below it, cannot be reduced. It seems difficult to accept this argument, when the plaintiffs themselves have broken the integrity of the mortgage and split up the liability.

Reading Section 7 of the new Act as a whole, it is quite obvious that it deals with a suit brought by a money-lender (against the defendant who is sued) is respect of a loan advanced (to the defendant sued against) in which a decree has to be passed (against the defendant who is sued) the amount of interest allowed prior to the suit not exceeding the amount of the loan advanced (to the defendant sued against) or if the loan (due from the defendant sued against) is based on a document, the amount of the loan (due from the defendant sued against) mentioned in or evidenced by such a document. It could not have been the intention of the legislature that if there are several executants who have borrowed various sums and the creditor sues one of them for his separate share only, having already realized the balance from the others, then the maximum prescribed for the amount of interest to be decreed against him is not to exceed the aggregate of the various sums borrowed by him as well as all the other *pro forma* defendants who are not really being sued. The only reasonable interpretation to put on the section is to read it as referring to the claim brought against the particular defendant who is sued, and the amount which is due from him alone and is the subject matter of the claim.

The construction sought to be put on the section on behalf of the plaintiffs would frustrate the object in view. In the present case, on the findings of the Courts below, the principal amount for which the contesting defendants were liable, is only Rs. 12,500 and no more. This is therefore the only amount, apart from interest, for which the decree can be passed against them. The mortgage deed was wholly invalid in respect of Rs. 25,000 as against them. In my judgment it will be in accord with the intention of the Provincial Legislature as disclosed by the various provisions in the Act for the reduction of interest to interpret the section so as to give relief to the defendants in respect of

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New Enactments.

BENGAL ACT VI OF 1940.*

THE BENGAL WORKMEN'S PROTECTION (AMENDMENT) ACT, 1940.

[*Passed by the Bengal Legislature.*]

[Assent of the Governor was first published in the *Calcutta Gazette* of the 25th April, 1940.]

An Act to amend the Bengal Workmen's Protection Act, 1934.

WHEREAS it is expedient to amend the Bengal Workmen's Protection Act, 1934, in the manner hereinafter appearing;

It is hereby enacted as follows:— Ben. Act IV of 1935.

1. This Act may be called the Bengal Workmen's Protection (Amendment) Act, 1940. Short title.

2. In the long title and in the preamble of the Bengal Workmen's Protection Act, 1934 (hereinafter referred to as the said Act), for the words "their place of work" the words "the places where they work or receive their wages" shall be substituted. Amendment of long title and preamble of Bengal Act IV of 1935.

3. For section 3 of the said Act the following section shall be substituted, namely:— Substitution of new section for section 3.

"3. (*1*) Whoever loiters at or near any place where a workman works or receives his wages in a manner or in circumstances indicating that he is so loitering with a view to recover any debt from such workman shall be punished with imprisonment which may extend to six months or with a fine which may extend to two hundred and fifty rupees or with both. Besetting certain places with a view to recover debt.

* Published in the Calcutta Gazette, dated the 25th April, 1940, Part III, Page 10.

(2) In this section the expression "workman" means a person employed by way of manual labour—

(a) by a local authority or in a public utility service, or

(b) in any mine, or

(c) at any dock, wharf or jetty, or

(d) in any railway station or yard, or

XXV of 1934. (e) in any premises where any manufacturing process, as defined in the Factories Act, 1934, is carried on,

VIII of 1923. and includes a seaman, as defined in the Workmen's Compensation Act, 1923.

Explanation.—The expression "public utility service" in this section means—

(a) any railway service; or

(b) any water transport service; or

(c) any tramway or motor service; or

(d) any postal, telegraph or telephone service; or

(e) any system of public conservancy or sanitation; or

(f) any industry, business or undertaking which supplies power, light or water to the public, or which the Provincial Government may, by notification in the *Official Gazette*, declare to be a public utility service for the purposes of this Act."

Notes:—This Act amends the Bengal Workmen's Protection Act (Bengal Act IV of 1935) by substitution of a new section for section 3, with a view to prevent the besetting of places where workmen receive their wages, by professional money-lenders for the purpose of recovering their dues. It also extends the protection afforded by the Act to workmen in the employ of local authorities and public utility services and to seamen.

BENGAL ACT VII OF 1940.*

THE INLAND STEAM-VESSELS (BENGAL AMENDMENT) ACT, 1940.

[*Passed by the Bengal Legislature.*]

[Assent of the Governor was first published in the *Calcutta Gazette* of the 25th April, 1940.]

An Act to amend the Inland Steam-vessels Act, 1917, in its application to Bengal.

WHEREAS it is expedient to amend the Inland Steam-vessels Act, 1917, in its application to Bengal in the manner hereinafter appearing;

* Published in the Calcuttn Gazette, dated the 25th April, Part III, page 11.

It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called the Inland Steam-vessels (Bengal Amendment) Act, 1940.

(2) It shall come into force on such date as the Provincial Government may, by notification in the, *Official Gazette*, appoint.

Application of Act.

2. The Inland Steam-vessels Act, 1917, shall, in its application to Bengal, be amended in the manner hereinafter provided.

Insertion of new section 44A in Act I of 1917.

3. After section 44 of the Inland Steam-vessels Act, 1917, the following section shall be inserted, namely:—

Power of Court to award costs of investigation under this Chapter.

"44A. A Court making an investigation under this Chapter may make such order as it thinks fit respecting the costs of the investigation or any part thereof and any money payable as costs by virtue of an order made under this section shall be recoverable under the provisions of the Code of Criminal Procedure, 1898, as if it were a fine."

Act V of 1898.

Notes:—Under the provisions of the Inland Steam-vessels Act, (Act I of 1917) the Provincial Government can appoint special Courts of investigation for the investigation of casualties to Inland Steam or Motor vessels plying in the rivers of Bengal. But there was no provision in the Act enabling the Government to levy fees or recover costs from the parties concerned. The result was that the Government had to bear all the expenses incidental to these Courts of investigation. The present amendment inserts a new section, viz., section 44A to the original Act authorising the Court of investigation to award costs. This provision corresponds to section 466(8) of the (English) Merchant Shipping Act, 1894. Thus the Indian law is brought into line with the English law.

BENGAL ACT VIII OF 1940.*

The Bengal Agricultural Debtors (Amendment) Act, 1940.

[*Passed by the Bengol Legislature.*]

[Assent of the Governor was first published in the *Calcutta Gazette* of the 2nd May 1940.]

An Act to amend the Bengal Agricultural Debtors Act, 1935.

WHEREAS it is expedient to amend the Bengal Agricultural Debtors Act, 1935, in the manner hereinafter appearing;

Ben. Act VII of 1936.

*Published in the Calcutta Gazette, dated the 2nd May, 1940, Part III, page 14.

It is hereby enacted as follows :—

Short title and commencement.

1. *(1)* This Act may be called the Bengal Agricultural Debtors (Amendment) Act, 1940.

(2) It shall come into force on such date as the Provincial Government may, by notification in the *Official Gazette*, appoint.

Amendment of section 2 of Bengal Act VII of 1936.

2. In section 2 of the Bengal Agricultural Debtors Act, 1935 (hereinafter referred to as the said Act)—

(1) after clause (6) the following clause shall be inserted, namely :—

" *(6A)* "Civil Court" means a Civil Court within the meaning of the Bengal, Agra and Assam Civil Courts Act, 1887, and includes any Court exercising appellate or revisional jurisdiction over any such Court ; ",

XII of 1887.

(2) in clause (8)—

(a) after the word "liabilities" the words and figures "incurred prior to the first day of January 1940" shall be inserted ;

(b) in sub-clause *(iv)*—

(i) after the word and figure "section 28" the word "and" shall be omitted, and

(ii) after the words "held by a tenant" the following shall be inserted, namely :—

"and

(c) any sum referred to in Article 12A of Schedule I to the Bengal Public Demands Recovery Act, 1913, or any sum ordered by a liquidator under any Act of the Provincial Legislature, for the time being in force, relating to co-operative societies, to be recovered as a contribution to the assets of a co-operative society or as the cost of liquidation thereof ; " ;

Ben. Act III of 1913

(c) in sub-clause *(v)* for the words "by limitation ; or" the words "by limitation, or which is otherwise irrecoverable under the law ; " shall be substituted ; and

(d) after sub-clause *(vi)* the following sub-clause shall be inserted, namely :—

"*(vii)* any tax or rate due to a Municipality or Union Board or Union Committee ; "

and

(3) after clause *(11)* the following clause shall be inserted, namely :—

"*(11A)* "original principal" means the loan as originally borrowed, excluding any amount of interest on such loan which may at any time have been included as principal ; ".

3. In the proviso to section 4 of the said Act for the words "officer who has had judicial experience" the words "servant of the Crown" shall be substituted. Amendment of section 4.

4. In section 7 of the said Act— Amendment of section 7.

(*a*) for the words, figures and brackets "sub-section (*2*) of section 9" the words, figures and brackets "sub-sections (*2*) or (*3*) of section 9" shall be substituted, and

(*b*) after the word, letter and brackets "clause (*b*)" the words, letter and brackets "or clause (*c*)" shall be inserted.

5. To section 9 of the said Act the following sub-section shall be added, namely :— Amendment of section 9.

"(*3*) If a debtor within the meaning of this Act is liable with other persons for a debt for arrears of rent, such debtor may, notwithstanding the provisions of clause (*b*) of sub-section (*1*), make an application under sub-section (*1*) of section 8 for relief in respect of the entire amount of such debt, and the Board, after consideration of the facts and circumstances of the case, may, if so empowered under section 7, pass such order as it thinks fit under this Act regarding the entire amount of such debt, and such order of the Board shall not be questioned in any Civil Court or in any manner other than that provided in this Act :

Provided that, notwithstanding anything contained in any other law,—

(*a*) on compliance in full by the said debtor with an order of the Board under this sub-section, his liability and that of the said other persons to the landlord for the arrears of rent in respect of which such order is made, shall cease, but the said other persons shall be liable to contribute to the debtor in respect of the sum paid by him under the said order, and

(*b*) during the period allowed in the said order for full compliance with the terms thereof relating to the arrears of rent, the landlord shall be debarred from instituting a suit for the recovery of the same, unless during such period the debtor fails to comply with the said terms."

6. In section 11 of the said Act— Amendment of section 11.

(*1*) in sub-section (*1*)—

(*a*) after clause (*d*) the following clause shall be inserted, namely :—

"(*dd*) details of any liabilities incurred on or after the first day of January 1940 ; " and

(*b*) after clause (*e*) the following clause shall be inserted, namely :—

"(*ee*) particulars of any property as in clause (*e*) of which the creditor has taken possession either as security for, or in lieu of payment of, any portion of the principal of the debt or any portion of the interest thereon, together with the name and address of any person who may be in possession of any portion of such property under the creditor ; " ;

(*2*) in sub-section (*2*)—

after clause (*e*) the following clause shall be inserted, namely :—

"(*ee*) particulars of any property as in clause (*e*) of which the creditor has taken possession either as security for, or in lieu of payment of, any portion of the principal of the debt or any portion of the interest thereon, together with the name and address of any person who may be in possession of any portion of such property under the creditor ; ".

Amendment of section 13.

7. In sub-section (*1*) of section 13 of the said Act—

(*a*) for the words and figure "If after consideration of the application the Board does not dismiss the application forthwith under section 17, it shall," the words, figures and brackets "At the time of giving the notice referred to in sub-section (*2*) of section 12, the Board shall," shall be substituted ;

(*b*) after the words "whichever is later" the following shall be inserted, namely :—

"and further requiring all creditors to produce on a date specified in the notices all documents (including entries in books of account) by which the creditor intends to prove any debt owing to him, together with a true copy of each such document" ; and

(*c*) in the proviso after the words "his statement of debt" the words "or the production of his documents and true copies thereof" shall be inserted.

Insertion of new section 13A.

8. After section 13 of the said Act the following section shall be inserted, namely :—

Notice to persons in possession under a creditor.

"13A. If in any statement of debt submitted by a creditor under sub-section (*1*) of section 13 any person who has not been served with a notice under sub-section (*2*) of section 12 is stated to be in possession of any portion of the immovable property of the debtor, the Board shall serve on such person

in the prescribed manner a notice requiring him, if he desires to make any representation, to appear before the Board on such date as may be specified in the notice."

9. In section 14 of the said Act— Amendment of section 14.

(*1*) sub-section (*1*) shall be omitted ;

(*2*) in sub-section (*2*) for the words "so produced" the words, figures and brackets "produced in compliance with the notice under sub-section (*1*) of section 13" shall be substituted ; and

(*3*) in sub-section (*3*) after the words, figure and brackets "as required by sub-section (*1*)" the words and figure "of section 13" shall be inserted.

10. In section 18 of the said Act— Amendment of section 18.

(*1*) in sub-section (*2*) for the words "after hearing the parties and considering the evidence produced" the words "the evidence produced, if any, after having given an opportunity to the parties to appear and be heard," shall be substituted ;

(*2*) sub-section (*3*) shall be omitted ; and

(*3*) after sub-section (*4*) the following sub-sections shall be added, namely :—

"(*5*) Notwithstanding anything contained in this Act or in any other law for the time being in force or in any contract, where a creditor has taken possession on any terms whatsoever of any immovable property of the debtor as security for, or in lieu of payment of, any portion of the principal of the debt or any portion of the interest thereon, and where the Court has not pronounced a final decree for foreclosure or has not confirmed a sale held in execution of a final decree for the sale of the property, the Board shall, in making the determination under sub-section (*2*), prepare an account in the prescribed manner of the receipts of the creditor derived from the said property and after deducting the expenses properly incurred by the creditor (of which an account shall similarly be prepared) either for the cultivation or for the management of the said property, shall credit the sum of such receipts in reduction of the amount, if any, from time to time due to the creditor as interest on the original principal of the debt and, so far as such sum exceeds any interest due, in reduction or discharge, as the case may be, of such original principal.

(*6*) In determining under this section the amount of arrears of interest due—

(*a*) the rate of interest taken shall not, notwithstanding anything contained in any contract, exceed the rate recoverable in a

suit or other proceedings for the recovery of the interest under any law for the time being in force, and

(*b*) where the debt relates to a loan in kind or where there is any stipulation for the payment of interest in kind, the money value of the principal or interest shall, where the circumstances require such calculation, be calculated in the manner prescribed."

Amendment of section 19.

11. In sub-section (*1*) of section 19 of the said Act—

(*a*) proviso (*ii*) to clause (*b*) shall be omitted, and

(*b*) after clause (*b*) the following clause shall be inserted, namely :—

"(*c*) when in respect of a debt referred to in sub-section (*5*) of section 18, the Board, if so empowered under section 7, considers that the debtor has made an offer for the settlement of the debt which the creditor ought reasonably to accept, it may order that the debt be settled in accordance with such offer, and may pass a further order directing the creditor to restore to the debtor by a specified date any immovable property of the debtor which is in his possession as security for or in lieu of payment of any portion of the principal of such debt or any portion of the interest thereon. Such date shall be fixed in consideration of the profits derived and the estimated profits which may be derived by the creditor from such property provided that in no case shall the date be fixed so as to allow the creditor to enjoy possession of the land of a *raiyat* or under-*raiyut* for a period exceeding fifteen years from the commencement of such possession."

Insertion of new section 19A.

12. After section 19 of the said Act the following section shall be inserted, namely :—

Delivery of immovable property to debtor.

"19A. (*1*) If the creditor does not restore possession of the immovable property to the debtor by the date specified in an award under sub-section (*2*) of secfion 19, the detor may, apply to the Certificate-officer execising jurisdiction in the area in which such property is situated, to be put in possession thereof.

(*2*) An application under sub-section (*1*) shall be accompanied by the prescribed process fee, and the Certificate-officer, after giving notice in the prescribed manner to the creditor and to any person who may be in possession under the creditor and after such inquiry as he considers necessary, may direct the creditor to pay to the debtor such compensation as appears to him to be fair and equitable in respect of the period during which the creditor or any person who may be in possession under him retained posses-

sion of the property in contravention of the said order of the Board together with costs incidental to the application under this section, and may also pass an order directing the creditor or any person who may be in possession under him to deliver possession of the property to the debtor by a specified date.

(3) If possession of the property is not delivered to the debtor by the date specified in an order under sub-section (2), the Certificate-officer shall on the application of the debtor, order delivery of possession to be made by putting in possession of the property the debtor or any other person whom he may appoint to receive delivery on his behalf, and in delivering possession, the Certificate-officer shall have the same powers as under the Bengal Public Demands Recovery Act, 1913. Ben. Act III of 1913.

(4) Any compensation and costs payable under an order under this section shall be recoverable as a public demand."

13. In section 20 of the said Act, after the word "not," the words "or whether a liability is a debt or not" shall be inserted. Amendment of section 20.

14. In section 21 of the said Act— Amendment of section 21.

(a) the words, figures and brackets "in excess of simple interest at the rate of six *per cent. per annum* on the principal of such debt as determined under sub-section (2) of section 18" shall be omitted, and

(b) for the words, figures and brackets "or such award has ceased to subsist under sub-section (5) of section 29, or, if there is no award, until the expiry of such period not exceeding ten years as may be specified in the certificate" the following words, figures and brackets shall be substituted, namely:—

"or until the expiry of such period not exceeding ten years as may be specified in the certificate, whichever is later, or, if the award ceases to subsist under sub-section (5) of section 29, until the award has so ceased to subsist."

15. In sub-section (1) of section 25 of the said Act, after clause (g) the following clause shall be inserted, namely:— Amendment of section 25.

"(h) the date, if any, by which possession of immovable property is to be restored to the debtor under the terms of an award under sub-section (2) of section 19."

16. To sub-section (1) of section 27 of the said Act the following proviso shall be added, namely:— Amendment of section 27.

"Provided that where an award under sub-section (2) of section 19 directs the restoration of possession of immovable pro-

perty to the debtor, the mortgage, charge or lien shall be subject to such modification as to the period of possession as may be contained in the award."

Amendment of section 33.

17. In clause (*a*) of section 33 of the said Act, after the words "before a Board" the words "or an Appellate officer or a District Judge or an Additional District Judge" shall be inserted.

Substitution of new section for section 34.

18. For section 34 of the said Act the following section shall be substituted, namely :—

Stay and abatement of suits and proceedings

"34. When an application under section 8 or a statement under sub-section (*1*) of section 13 includes any debt in respect of which a suit or other proceedings is pending before a Civil or Revenue Court, or when an Appellate Officer entertains an appeal or a District Judge or an Additional District Judge entertains an application for revision, relating to such a debt, the Board or the Appellate Officer or the District Judge or the Additional District Judge, as the case may be, shall give notice thereof to such court in the prescribed manner, and thereupon the suit or the proceeding shall be stayed until the Board has either dismissed the application in respect of such debt or made an award thereon or until the Appellate Officer has disposed of such appeal or the District Judge or the Additional District Judge has disposed of such application for revision, and if the Board or the Appellate Officer or District Judge or Additional District Judge includes any part of such debt in clause (*d*) of sub-section (*1*) of section 25 in the award or decides that the debt does not exist the suit or proceeding shall abate so far as it relates to such debt.

Explanation.—For the purpose of this section an execution proceeding for the sale of any property shall be deemed to be pending and the debt in respect of which the sale takes place shall be deemed to exist until such sale becomes absolute."

Amendment of section 35.

19. In section 35 of the said Act—

(*1*) in clause (*ii*) after the word "debtor" the words and figures "on or after the first day of January, 1940, or" shall be inserted; and

(*2*) in clause (*iii*)—

(*a*) for the words "a debt" the words "any sum in respect of any loan other than a loan recoverable as a public demand" shall be substituted, and

(*b*) after the word "debtor" the words and figures "on or after the first day of January, 1940, or" shall be inserted.

20. In section 40 of the said Act— *Amendment of section 40.*

(*1*) for the proviso to sub-section (*1*) the following proviso shall be substituted, namely :—

"Provided that an appeal against any order under section 21, section 22 or section 29, and no other appeal shall be made to an Appellate Officer appointed under this section who has had such judicial experience as may be prescribed."

(*2*) after sub-section (*4*) the following sub-section shall be inserted, namely :—

"(*4A*) The Appellate Officer may stay any order directing the restoration of possession of immovable property to a debtor under clause (*c*) of sub-section (*1*) of section 19 pending the disposal of an appeal preferred to him against such order."

(*3*) for sub-section (*6*) the following shall be substituted, namely :—

"(*6*) subject to the provisions of section 40A, the orders of the Appellate Officer shall be final."

21. After section 40 of the said Act the following section shall be inserted, namely :— *Insertion of new section 40A.*

"40A. (*1*) An application may be made in the prescribed manner for revision by the District Judge of an order made by an Appellate Officer. *Revision.*

(*2*) An application under sub-section (*1*) shall lie if made within thirty days of the date of the order referred to in that sub-section.

(*3*) Every such application shall be made to the Appellate Officer who shall forward to the District Judge the record of the case, the application and any explanation which he may desire to offer in respect of the application.

(*4*) The District Judge shall consider such papers as may be forwarded to him by the Appellate Officer, but shall not hear the parties or any person appearing on their behalf.

(*5*) If the District Judge does not reject the application, he may, if he is satisfied that there has been a substantial failure of justice by reason of any illegality or irregularity contained in the order of the Appellate Officer, or for any other sufficient cause either modify or reverse the order or any portion thereof:

Provided that the District Judge may transfer to an Additional District Judge subordinate to him any papers forwarded to him by an Appellate Officer under sub-section (*3*) and such Additional District Judge shall in respect of the applications so transferred

exercise the same powers and perform the same duties as those respectively conferred and imposed upon the District Judge under this section."

Omission of section 41.

22. Section 41 of the said Act shall be omitted.

Amendment of section 44.

23. In section 44 of the said Act—

(*a*) in clause (*a*) after the words "person interested" the words "or of its own motion", and

(*b*) in clause (*b*) after the words "person interested" the words "or of his own motion"

shall be inserted.

Amendment of section 55.

24. In sub-section (*2*) of section 55 of the said Act—

(*a*) in clause (*i*) after the word and figure "section 13" the words, letters, figures and brackets "section 13A, sub-section (*2*) of section 19A" shall be inserted;

(*b*) after clause (*m*) the following clauses shall be inserted, namely:—

"(*ma*) the preparation of accounts of receipts and expenses of a creditor under sub-section (*5*) of section 18;

(*mb*) the calculation of the money value of principal or interest referred to in sub-section (*6*) of section 18;".

Insertion of new section 57.

25. After section 56 of the said Act the following section shall be inserted, namely:—

Certain fees recoverable as public demands.

"57. The fees which may be prescribed under clause (*b*) of sub-section (*2*) of section 55 for an order of determination under sub-section (*2*) of section 18 and which have not been paid by the date fixed by the Board shall be recoverable as public demands payable to the Collector."

Notes:—This Act amends the Bengal Agricultural Debtors Act (Bengal Act VII of 1936). The following are the important amendments made by it:—

(1) A definition of "Civil Court" has been added, according to which the High Court in the exercise of its appellate or revisional jurisdiction, would be a Civil Court.

(2) The definition of "debt" has been restricted to liabilities incurred prior to 1st January, 1940.

(3) Procedure before the Boards has been simplified by reducing the number of preliminary notices to be issued.

(4) Provision has been made to accelerate disposal by eliminating certain intervals between successive stages in the preliminary

part of the proceeding and by providing for prompt payment of fees.

(5) A procedure has been laid down for dealing with debts secured by usufructuary mortgages and for restoration of the land to the debtor.

(6) It has been made clear that for purposes of sections 33 and 34 execution proceedings shall be deemed to be pending till the sale is confir med.

(7) Powers of Revision have been given to the District Judge for revising an order made by an Appellate Officer.

BENGAL ACT IX OF 1940.*

THE BENGAL NON-AGRICULTURAL TENANCY (TEMPORARY PROVISIONS) ACT, 1940.

[*Passed by the Bengal Legislature.*]

[Assent of the Governor was first pu blished in the *Calcutta Gazette* of the 30th May, 1940]

An Act to provide for the temporary stay of certain suits and proceedings for ejectment of certain non-agricultural tenants.

WHEREAS it is expedient, pending the enactment of further legislation, to provide for the temporary stay of certain suits and proceedings for ejectment of certain non-agricultural tenants ;

It is hereby enacted as follows :—

1. (*1*) This Act may be called the Bengal Non-Agricultural Tenancy (Temporary Provisions) Act, 1940. Short title, extent and duration.

(*2*) It extends to the whole of Bengal, excluding Calcutta as defined in clause (*11*) of section 3 of the Calcutta Municipal Act, 1923 and such suburbs of Calcutta as may have been or may hereafter be notified under section 1 of the Calcutta Suburban Police Act, 1866. Ben. Act III of 1923. Ben. Act II of 1866.

(*3*) It shall continue in force for two years from the date of its commencement.

2. In this Act, unless there is anything repugnant in the subject or context,— Definition of a non-agricultural tenant.

*Published in the Calcutta Gazette, dated the 30th May, 1940, Part III, p. 24.

"non-agricultural tenant" means a tenant who holds under another person, and is liable to pay rent to such person for, non-agricultural land which, under the terms of any agreement, such tenant is entitled to use for any homestead or residential purpose or for the conduct thereon of any commercial or industrial enterprise or any trade or business, but does not include a tenant who so holds non-agricultural land together with any structure thereon erected or owned by the person under whom such tenant holds or by the superior or predecessor in interest of such person.

Stay of suits and proceedings for ejectment of non-agricultural tenants.

3. Notwithstanding anything contained in any other law for the time being in force, every suit and proceeding in any Court for ejectment of a non-agricultural tenant, other than a suit for proceeding for ejectment on account of the non-payment of rent by such tenant, shall be stayed for the period during which this Act continues in force :

Provided that every proceeding for delivery of possession in execution of a decree for ejectment on account of the non-payment of rent by such tenant shall be stayed if, within thirty days from the date of the decree, such tenant deposits into Court the amount of the decree together with the costs of the proceeding.

Setting aside of certain orders for delivery of possession.

4. Notwithstanding anything contained in any other law for the time being in force, a non-agricultural tenant or a person who, but for his ejectment in execution of a decree for ejectment, would have been deemed to be a non-agricultural tenant for the purposes of this Act, if he has been ejected between the thirtieth day of January, 1940, and the date of the commencement of this Act in execution of a decree for ejectment to which the provisions of section 3 are applicable may, within three months from the date of the commencement of this Act and without payment of any fee under the Court-fees Act, 1870, apply to the Court which made the order for delivery of possession to have such order set aside; and such Court, if satisfied that the order was made between the dates aforesaid and in any proceeding in execution of a decree for ejectment to which the provisions of section 3 are applicable, shall set aside the order and shall direct that the applicant be restored to possession of the land to which the order relates.

VII of 1870.

Right to realize rent and compensation in certain cases.

5. Notwithstanding anything contained in any other law for the time being in force—

(1) the holder of a decree for ejectment to which the provisions of section 3 are applicable shall be entitled—

(*a*) after the thirtieth day of January, 1940, and for the period during which this Act continues in force, to realize from the judgment-debtor rent at the rate at which the judgment-debtor was paying rent when notice to quit was served upon him, and

(*b*) between the thirtieth day of January, 1940, and the date of the commencement of this Act, in respect of compensation awarded under such decree, to realize from the judgment-debtor compensation calculated on the basis of the rate at which the judgment-debtor was paying rent when notice to quit was served upon him; and

(*2*) the realization of rent under sub-clause (*a*), or of compensation under sub-clause (*b*), of clause (*1*) shall not be deemed to estop the decree-holder from executing the decree for ejectment when such decree becomes executable.

Stay of all suits and proceedings for ejectment pending at the date of the commencement of this Act.

6. Subject to the provisions of sections 4 and 5, every suit and proceeding to which the provisions of section 3 are applicable, which is pending at the date of the commencement of this Act, shall be stayed for the period during which this Act continues in force.

Saving of limitation.

7. In computing the period provided by any law for the time being in force for the execution of a decree for ejectment to which the provisions of section 3 are applicable, or for the institution of a suit for the ejectment of a non-agricultural tenant, the period during which this Act continues in force shall be excluded.

Exemption of certain tenants.

8. Nothing in this Act shall apply to any tenant who holds non-agricultutal land under the Central or Provincial Government or under a local authority.

Notes :—The object of the present Act is to provide for the temporary stay of certain suits and proceedings for ejectment of certain non-agricultural tenants, pending the enactment of further legislation by the Government. The Act is a temporary measure in order to preserve the *status quo* for the time being and will remain in force for two years.

NOTES OF CASES.

Rukmani Ammal *v.* Subramania Sastrigal.

1939.

I. L. R. [1940] Mad. 420.

Code of Civil Procedure (Act V of 1908) Order 41 rule 6 (2), Order 21 rule 64, rule 66 (2) (e), rule 90.

Rukmani's petition for staying the sale, as appeals were pending, was disallowed and the sale was held. Her application under Order 21 rule 90 and section 47 for setting aside sale was dismissed. On appeal :

Held [per *Burn* and *Stodart JJ.*]—that misdescriptions of the nature of lands in sale proclamation and refusal to sell the lands in small lots are irregularities, that refusal to observe the provisions of Order 41 rule 66 (2) is illegality and that the sale was illegal.

S. C.

In re Nainamuthu (accused).

1939.

I. L. R. [1940] Mad. 428.

Code of Criminal Procedure (Act V of 1898), section 164—Indian Penal Code (Act XLV of 1860), section 300, exception 5.

The accused, a married Adi-Dravida, killed his concubine at her request with her consent and made a statement before a magistrate describing the details. At the trial, the admission of the statement in evidence was objected to, but the accused was sentenced to death. On appeal.

Held [per *Burn* and *Stodart JJ.*]—that the statement was the first information to a magistrate who was not investigating the case and that the accused was guilty of culpable homicide not amounting to murder.

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Sulaiman, J.

the interest which they would otherwise be liable to pay. I am, therefore, of the opinion that the plaintiffs are entitled to have a decree for the principal sum of Rs. 12,500 and a total interest Rs. 12,500, up to 26th April, 1929, when the suit was filed, plus *pendente lite* and future interest as ordered by the High Court.

Varadachariar, J.—I wish to add a few words with reference to the contention urged by the learned counsel for the respondents on the application of Section 7 of the Bihar Act of 1939 to the circumstances of this case. That section limits the interest claimable up to the date of the plaint to the "amount of loan mentioned in the document." As Rs. 1,00,000 is the amount mentioned in the mortgage bond in the present case, the learned counsel argued that the plaintiffs were entitled to claim full interest as per terms of the bond, so long as it did not exceed Rs. 1,00,000. I am unable to accede to this contention. On the plaintiffs' own showing, the liability of the appellants to the plaintiffs was only to the extent of one-sixth of the total liability and the total amount of the loan has for the purposes of this suit been found to be only Rs. 75,000. Though the respondents' contention has the merit of plausibility and ingenuity, it seems to me that on a reasonable interpretation of the section, the appellants' liability for interest up to the date of the institution of the suit must be limited to Rs. 12,500. The appeal is to this extent allowed and the case will be remitted to the High Court for a revised decree being passed on the above footing. The plaintiffs will be entitled to the costs awarded to them by the decrees of the High Court and the trial Court. There will be no order as to the costs of this appeal.

Gwyer, C.J.—I agree.

A. T. M.

Appeal allowed in part : Case remanded.

APPELLATE CIVIL.

Before Mr. Justice R. C. Mitter and Mr. Justice A. S. M. Akram.

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August, 6, 7, 14.

NILRATAN MUKHOPADHYA AND OTHERS

v.

THE COOCH BEHAR LOAN OFFICE LTD. AND OTHERS.*

Promissory note, suit on—Suit against ten persons in the Court of the Civil Judge of Cooch Behar—Decree against five—Subsequent suit in British Indian Court on the same promissory note, if maintainable—Judgment against some, if a bar to a suit against others—Joint and several liability—Principle of Private International Law.

It is a well established principle of Private International Law that a foreign judgment only creates a new obligation to pay but does not extinguish the original cause of action for the debt

If a liability is *joint* and *several*, a judgment obtained against some would be no bar to a suit against the others.

A promissory note executed by several persons creates in India a joint and not a joint and several liability and a suit against some would be a bar to a suit against others who have not been impleaded when both the suits are suits filed in domestic Courts. Such a rule would not apply where the first suit and judgment pronounced against some of several joint promissors or contractors is a judgment not of a domestic Court but of a foreign Court: *Hemendro Coomar Mullick* v. *Rajendrolall Moonshee* (1) and *King* v. *Hoare* (2) referred to.

A foreign judgment involves no merger of action and a judgment of a foreign Court does not operate in merging the original cause and the principle of *nemo debet bis vexari* (i. e. no person should be twice disturbed for the same cause) does not apply.

Ten persons borrowed a sum of money from the Cooch Behar Loan Company Limited on a promissory note. Of these ten persons five were and are residents and subjects of Cooch Behar State but the remaining five were and are British subjects and residents of Britssh India. A suit to recover the dues on the promissory note was instituted against those ten persons in the Court of the Civil Judge of Cooch Behar and an *ex parte* decree passed. In that suit the five persons who are British subjects and residents of British India did not at any stage appear in the Cooch Behar Court and so did not submit to the jurisdiction of that Court. After the said decree the company realised a portion of the decretal amount from the five persons who were residents of Cooch Behar and subjects of that state. A suit was thereafter brought by the com-

*Appeal from Original Decree No. 70 of 1937, with application, against the decree of Kumud Bandhu Sen, Esq., Subordinate Judge, Jalpaiguri, dated the 4th December, 1936.

(1) (1878) I. L. R. 3 Calc. 353; 1 C. L. R. 488.

(2) (1844) 13 M. & W. 494; 53 1 E. R. 206.

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pany in the Court of the Subordinate Judge of Jalpaiguri against the aforesaid ten persons to recover the balance of the sum due. The suit was for enforcement of the judgment of the Cooch Behar Court against those five defendants who were British subjects and residents of British India and alternatively it was based on the original cause of action namely on the promissory note and a decree against them was prayed for :

Held, that the company's suit in the Court of the Subordinate Judge at Jalpaiguri regarded as a suit based on the original cause of action viz. on the promissory note, was a good suit.

Appeal by the Defendants.

Suit for recovery of a sum due on a promissory note.

The material facts will appear from the judgment.

Messrs. Hemendra Chandra Sen and *Satyendra Chandra Sen* for the Appellants Nos. 1 to 5 B

Dr. Naresh Chandra Sen Gupta and *Mr. Bhagirath Chandra Das* for the Appellant No. 6.

Messrs. Atul Chandra Gupta, Jatindranath Sanyal, Jatindra Mohan Choudhury, Joy Gopal Ghose and *Sisir Kumar Basu* for the Respondents.

C. A. V.

The judgments of the Court were as follows :

August, 14.

On the 7th January, 1929, ten persons jointly borrowed Rs. 18000 from the Cooch Behar Loan Company Ltd. hereafter called the company, on a promissory note carrying interest at 9 per cent per annum. Of these ten persons five were and are residents and subjects of the Cooch Behar State but remaining five persons were and are British subjects and residents of British India. On the 6th January, 1932, the company instituted a suit to recover its dues against the said ten persons in the Court of the Civil Judge at Cooch Behar and on the 1st April, 1932, recovered an *ex parte* decree for Rs. 21203 and costs. The five persons who are British subjects and residents of British India (defendants Nos. 1 to 5 of this suit) did not at any stage appear in the Cooch Behar Court, and so did not submit to the jurisdiction of that Court. After the said decree a sum of Rs. 12236 was realised by the company from the five persons who were residents of Cooch Behar and subjects of that State. They are defendants Nos. 6 to 10 in this suit. Thereafter the company applied on the 17th January, 1934, to execute the said decree against defendants Nos. 1 to 5 in British Indian Court, namely the Court of the Subordinate Judge at Jalpaiguri, as in the notification issued by the Governor General in Council under section 44 of

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the Civil Procedure Code Civil Courts of Cooch Behar are included. The Subordinate Judge at Jalpaiguri, however, by his order dated the 17th March, 1934, refused to execute that decree, on the ground that the decree of the Civil Court of Cooch Behar passed against the said defendants (defendants Nos. 1 to 5) was void as that Court had no jurisdiction over them, as they were neither residents of Cooch Behar, nor subjects of the Cooch Behar State, nor had they submitted to the jurisdiction of that Court. On the same date on which the application for execution was filed in the said Court, that is the 17th January, 1934, the suit in which this appeal arises was filed by the company in the Court of the Subordinate Judge at Jalpaiguri against the aforesaid ten persons to recover the balance, namely the sum of Rs. 11959. The suit was for enforcement of the judgment of the Cooch Behar Court against defendants Nos. 1 to 5, alternatively it was based on the original cause of action, namely on the promissory note, and a decree against defendants Nos. 1 to 5 for the balance due was prayed for. To save the suit from the bar of limitation, so far as it was based on the original cause of action, acknowledgment of liability on the part of the defendants was pleaded. The claim to enforce the judgment of the Cooch Behar Court against the said defendants was given up by the company in the lower Court and that claim has not been reiterated before us.

The learned Subordinate Judge by his judgment dated the 4th December, 1936, held that the company had the right to fall back upon the original cause of action and that the suit based on the promissory note was not barred by limitation by reason of acknowledgment of liability by defendants Nos. 1 to 4 and of defendant No. 5, who had died during the pendency of the suit and whose heirs are defendants Nos. 5 (a) and 5 (b). He accordingly decreed the suit against defendants Nos. 1 to 5 (b). Defendants Nos. 1 to 5 (b) have preferred this appeal. It is contended on their behalf that

(1) the suit based on the promissory note is not maintainable and (b) in any event it is barred by limitation.

The first point has been urged on two grounds.

(a) that the original cause of action, no longer subsists after the judgment of the Cooch Behar Court, it being merged therein and

(b) even if that be not the position, the company having sued and obtained an effective decree in the Cooch Behar Court against some of the joint promissors, e. g. defendants Nos. 6 to 10, can-

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not again sue the other joint promissors, (defendants Nos. 1 to 5) on the promissory note.

It is a well established principle of Private International Law that a foreign judgment only creates a new obligation to pay but does not extinguish the original cause of action for the debt. A foreign judgment involves no merger of the original cause of action. The creditor thereupon has the option of bringing an action in a domestic tribunal on the foreign judgment which he has recovered or of bringing in a domestic tribunal a suit upon the original cause of action. Tindal C. J. speaking of a foreign judgment in *Smith* v. *Nicolls* (1) observed thus: "If therefore the judgment has not altered the nature of the rights between the parties, it appears to me that the plaintiff has the option, either to resort to the original ground of action or to bring an assumpsit on the judgment recovered". Such being the principle it does not matter whether the procedure for enforcing a foreign judgment is by a suit or by an application in the form of execution. The mere fact that by reason of the notification issued by the Governor General in Council under section 44 of the Civil Procedure Code the plaintiff had the right to enforce the foreign judgment by an application for execution would not in our judgment alter the legal character of the foreign judgment. In law it would still be regarded as only creating an independent obligation on the judgment-debtor to pay the sum adjudged without involving a merger of the original cause of action. The case of *Chormal Balchand* v. *Kasturi Chand* (2) was a case where the plaintiff had sued on the foreign judgment and not on the original cause of action. The effect of the notification issued under section 44 of the Code of Civil Procedure was however considered and it was held that only the *procedure* for enforcing the foreign judgment in a British Indian Court had been changed thereby, leaving all the incidents of a foreign judgment untouched. In the case before us there is an additional reason for holding that the original cause of action against defendants Nos. 1 to 5 has not been merged in the judgment of the Cooch Behar Court, because from the point of view of Private International Law the judgment of that Court against defendants Nos. 1 to 5 is a nullity and has been so adjudged by a competent British Indian Court. We accordingly hold that the company's suit in the Court of the Subordinate Judge at Jalpaiguri regarded as a suit based on the original cause of action e. g. on the promissory

(1) (1839) 5 Bing N. C. 208.
(2) (1936) 40 C. W. N. 591.

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note, is a good suit. The first branch of Dr. Sen Gupta's argument on the first point is accordingly overruled.

The second ground in support of the first point has been urged in the following manner. It is said that a joint promise by two or more promissors creates a *joint* liability and that this is the law in India. The only effect of section 43 of the Indian Contract Act is to give the promissee the right to sue any one of the joint promissors, without impleading the others in the suit, but it does not make the liability of joint promissors *joint* and *several.* A decree recorded against some of the joint promissors accordingly bars a second suit against the rest. For these propositions reliance has been placed on the judgment of Garth, C. J. and Markby J. in *Hemendro Coomar Mullick* v. *Rajendrolall Moonshee* (1). The rule laid down in that case is invoked by the appellants' Advocate by saying that as the decree passed against defendants Nos. 1 to 5 by the Cooch Behar Court is a nullity they must be regarded as not being parties in the Cooch Behar Court and the suit filed in the Cooch Behar Court must be regarded as having been filed against defendants Nos. 6 to 10 only. We will assume that this is the true position.

There cannot be any dispute that if the liability is *joint* and *several*, a judgment obtained against some would be no bar to a suit against the others, In *Hemendro Coomar Mullick's* case (1) it was held that a promissory note executed by several persons jointly creates in India a *joint* and *not a joint* and *several* liability. The rule laid down in *King* v. *Hoare* (2), a case of joint contract, and in *Brinsmeed* v. *Harrison* (3), a case of joint tort, was applied and it was held that a judgment, though unsatisfied, obtained against some of the joint promissors barred a second suit against the rest. The case of *Hemendro Coomar Mullick* v. *Rajendrolall* (1); *King* v. *Hoare* (2) and cases of the same type where the same rule was laid down e. g. *Kendall* v. *Hamilton* (4) etc. were all cases where both the suits, the first and the second, had been brought in domestic Courts.

In India there is a divergence of judicial opinion as to the effect of section 43 of the Indian Contract Act. In *Hemendro Coomar Mullick's* case (1) it was held that that section had not the effect of making the liability of joint promissors joint and several, and had

(1) (1878) I. L. R. 3 Calc. 353; 1 C. L. R. 488.

(2) (1844) 13 M. & W. 494; 153 E. R. 206.

(3) (1872) L. R. 7 C. P. 547.

(4) (1879) L. R. 4 A. C. 504.

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not the effect of making inapplicable in India the rule laid down by Baron Parke in *King* v. *Hoare* (1). This view has been adopted in Madras. In *Muhamad Askari* v. *Radhe Ram* (2) Strachey, C. J. and Banerjee, J. took a different view. In Bombay Farran, J. also took a different view of section 43 of the Contract Act. [*Matilal* v. *Ghellabhai* (3)]. In *Shivlal Matilal* v. *Bridhichand Jivraj* (4) Macleod, J. reviewed the leading cases on the subject and agreed with the view taken in *Hemendro Coomar Mullick's* case (5). In this Court the principle laid down therein has been followed in many cases. In *Krishnadas Roy* v. *Kalitara* (6), however, the specific question we have to decide was not decided, but there are observations in the judgment of both Chatterjea, J. and Richardson, J. which imply that a joint contract in India creates a joint and several liability on the part of the joint promissors. The matter again came up for decision in *Miss Moselle Solomon* v. *Martin and Company* (7). The learned Judges Lort Williams, J. and Jack, J. differed on this point, though they agreed in decreeing the appeal on other grounds. In this state of the case law we would have referred the matter to the Full Bench, but in the view we are taking that course is not necessary. We would proceed upon the assumption that the rule laid down in *Hemendro Coomar Mullick's* case (5) is a good rule when both the suits are suits filed in domestic Courts. The observation made in that case must be taken to relate to suits in domestic tribunals, for Garth, C. J. and Markby, J. were dealing with the previous judgment of a domestic and not of a foreign Court. The rule laid down by them was expressly based on the decision in *King* v. *Hoare* (1). We will have therefore to examine the grounds on which *King* v. *Hoare* (1) and other English cases have proceeded.

Baron Parke first considered the case of only *one* debtor or *one* wrong-doer. He observed that on a judgment being recovered in a Court of record, the judgment was a bar to the original cause of action, because it is thereby reduced to a certainty and the object of the suit attained. It would be useless and vexatious to subject the defendant again to another suit to obtain the same result. The second suit would be barred on the principle that the matter had passed by the result of the first suit to the domain of judgment

(1) (1844) 13 M. & W. 494 ; 153 E. R. 206.
(2) (1900) I. L. R. 22 All. 307.
(3) (1892) I. L. R. 17 Bom. 6.
(4) (1917) 19 Bom. L. R. 370.
(5) (1878) I. L. R. 3 Calc. 353.
(6) (1917) 22 C. W. N. 289.
(7) (1934) 39 C. W. N. 461.

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*transit in rem judicatam.** The original cause of action, so to say, had merged in the judgment rendered. It had thereafter no existence, and so could not be enforced by a separate action. Baron Parke then considered the case of more than one joint debtor or more than one joint tort-feasor. He said that in such cases as the liability was joint, there was *one* cause of action for the breach of the joint contract or for the joint tort, and not as many causes of action in number as were parties to the joint contract concerned in the breach or as many persons concerned in the joint tort. As soon therefore there was a judgment against one or some of them the cause of action which was a *single one* merged in the judgment on the same principles formulated in the case where there was only *one* debtor or one tort-feasor. After the judgment in law nothing of original cause of action was left. In some cases which were decided after *King* v. *Hoare* (1) it was said that Baron Parke had only laid down a rule of procedure but this view of *King* v. *Hoare* (1) was negatived by the House of Lords in *Kendall* v. *Hamilton* (2). In that case it was also pointed out that the rule formulated in *King* v. *Hoare* (1) did not proceed upon the principle of election, namely that the plaintiff by suing some out of several joint debtors had elected to take them as his debtors to the exclusion of those whom he had not joined in the action, but that it proceeded upon two principles of substantive law. The first was the principle of the merger of the cause of action in the judgment—*transit in rem judicatam*,—and the second was a principle of public policy that there should be an end of litigation—there should not be a vexatious succession of suits on the same cause of action—*nemo debet bis vexari pro una et eadem causa*. Such being the basis of the rule laid down in *King* v. *Hoare* (1), the said rule cannot in our judgment apply where the first judgment pronounced against some of several joint promissors or contractors is a judgment not of a domestic Court but of a foreign Court, for a judgment of a foreign Court does not operate in merging in it the original cause and the principle of *nemo debet bis vexari* etc. also does not apply. The original cause of action still subsists in such a case and a second suit based on it can still be filed in domestic tribunal. On the principle analogous to the principle of *cessante ratio legis cessat ipsa lex*† the rule formulated in *King* v. *Hoare* (1)and here in India in

(1) (1844) 13 M. & W. 494 ; 153 E. R. 206.
(2) (1879) L. R. 4 A. C. 504.

* Meaning—The matrer passes into a judgment, if matter already judicially decided, whereby the original cause of aotion is merged and destroyed in the judgment—Desai.

† Meaning—The reason of the law ceasing, the law itself ceases—Desai.

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Hemendro Coomar Mullick v. *Rajendrolall Moonshee* (1) should not be applied to the case before us because the judgment in the previous suit was a judgment of a foreign Court. If that foreign judgment had been fully satisfied, a suit in the domestic tribunal would have been barred but then on a different principle. The application of the rule laid down in *King* v. *Hoare* (2) and *Hemendro Coomar Mullick's* case (1) to a type of case which we have before us would work great injustice. When a creditor lends money to several persons on a joint promissory note or when a person enters into a joint contract with several persons he relies upon the joint credit, the credit to all of them. According to the English rule he has to sue them all in one suit, and when all are residents or subjects of the same state he gets an effective decree against all which he can execute against the property of one and all the defendant judgment-debtors. In India he can sue one or some without making others parties, but that is his own *option*. He can sue all or some in one action. If however some of the joint promissors be the residents or subjects of one state and the others of another state and if the rule laid down in *King* v. *Hoare* (2) and *Hemendro Coomar Mullick's* case (1) be made applicable to such a case the promissee would on the breach of that joint contract be compelled to make his election of either proceeding against the first set or the second set of joint promissors. That rule would have the effect of compelling him to have recourse to the security of some of the joint promissors only, when by entering into the contract he intended to have the security of all of them. For the aforesaid consideration also we think that the rule formulated in *King* v. *Hoare* (2) and *Hemendro Coomar Mullick's* case (1) should not apply to such a case. The promissee who has the right to sue on the original cause of action both in the foreign Court and in the domestic Court may in such a case sue those promissors who are residents or subjects of the foreign state in the foreign Court and so get against them an effective judgment in that Court and may also sue the others who are residents or subjects of British India in a British Indian Court on the original cause of action and so get an effective judgment against them. Any other view would work hardship. In *Laksmishankar* v. *Vishnuram* (3) the learned Judges held that a decree passed in a foreign Court (Court of Baroda) against one person on a *joint khata* account did not bar a

(1) (1878) I. L. R. 3 Calc. 353.
(2) (1844) 13 M. & W. 494 ; 153 E. R. 206.
(3) (1899) I. L. R. 24 Bom. 77.

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suit in a British Indian Court against his partners, though the liability was joint. Though the reason for the decision given was that the judgment of the Baroda Court was not *res judicata* in the suit in British India, and not the reasons on which we support our judgment the result is the same. We accordingly overrule this branch of the argument of the appellant's Advocate on the first point.

We do not also see any substance in the second point, the point regarding limitation. On the 27th January, 1931 the company wrote a letter to all the defendants. By that letter it demanded payment within two months and threatened them with a suit if the demand was not complied with. In reply to this letter defendant No. 1 wrote a letter to the company on the 28th January, 1931 (Ex. 27). That letter contains an acknowledgment of liability by him and the suit against him is saved. The company led uncontradicted evidence that the other defendants authorised defendant No. 1 to write that letter on their behalf. The learned Subordinate Judge has discussed that evidence and we do not think it necessary to re-iterate the reasons given by him for holding that defendant No 1 was their agent in the matter of acknowledgment of liability. We accept the findings of the learned Subordinate Judge in this respect and hold that the suit is in time against all the defendants appellants.

The result is that this appeal fails. It is accordingly dismissed with costs to the plaintiff company.

The application for adducing additional evidence is rejected.

P. R. *Appeal dismissed.*

PRIVY COUNCIL.

PRESENT: *Lord Thankerton, Lord Russell of Killowen, Lord Normand (Lord President of the Court of Session), Sir George Rankin and Lord Justice Goddard.*

THE COMMISSIONER OF INCOME-TAX, BENGAL

v.

MESSRS. MAHALIRAM RAMJIDAS.

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April, 25.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL].

Revenue—Income tax—Revenue authorities having reason to suppose that return of income false—Power to order further return—Exercisable without first establishing falsification by quasi-judicial enquiry—Indian Income Tax Act (XI of 1922), Section 34.

Section 22 (2) of the Indian Income Tax Act, 1922, authorises the Income-tax Officer to serve notice requiring a person to make a return of his income, and sub-section (4) authorises him to require the production of documents and accounts.

Section 34 of the Indian Income Tax Act is not to be read subject to an implied proviso that the Income-tax Officer is not to resort to the procedure which it lays down except after a decision, based on a quasi-judicial enquiry, that income has in fact escaped tax. Accordingly the officer is not required by the section to convene the assessee or to intimate to him the nature of the alleged escape from taxation or to give him an opportunity to be heard before he decides to put into operation the powers which the section confers.

In interpreting a section of a taxing Act, which imposes no charge on the subject and deals merely with the machinery of assessment, the rule is that that construction should be preferred which makes the machinery workable, *ut res valeat potius quam pereat.*

Privy Council Appeal No. 27 of 1939, from a decision of the High Court of Judicature at Fort William in Bengal, dated 24th February, 1938, (*Derbyshire, C. J.*, and *Panckridge, J.*) on a reference under section 66 (1) of the Indian Income Tax Act, 1922.

The firm of Mahaliram Ramjidas made a statutory return of income which shewed a loss and were accordingly assessed to income tax at nil for the material year. Subsequently allegations were made to the Income-tax officer that the firm's return was false. *Ex parte* and informal enquiries having satisfied him that the firm had deliberately misled him and that prima facie chargeable income tax had escaped assessment, he issued a notice to the firm under section 34. The firm having contended that such a notice could not be validly served on them until they had had an opportunity of being heard, the matter was referred to the

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High Court on a case stated under section 66 (1) of the Act. The Court held in effect that the income tax officer was not entitled to exercise his power under section 34 unless he had first held a quasi-judicial enquiry to which the assessee had been convened.

The Commissioner appealed.

T. Millard Tucker, K. C. and *W. Wallach* for the Appellant.

J. M. Parekh for the Respondent Firm.

Their Lordships' judgment was delivered by

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Lord Normand : This is an appeal by the Commissioner of Income-tax, Bengal, against a judgment of the High Court of Judicature at Fort William in Bengal delivered on a reference made under section 66 (*a*) of the Indian Income-tax Act, 1922. The respondents are a registered partnership firm carrying on business in Calcutta.

The question in the appeal turns on the true construction of section 34 of the Indian Income-tax Act, 1922. That section enacts :—

"34. If for any reason income, profits or gains chargeable to income-tax has escaped assessment in any year or has been assessed at too low a rate, the Income-tax Officer may, at any time within one year of the end of that year, serve on the person liable to pay tax on such income, profits or gains, or, in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 22 and may proceed to assess or re-assess such income, profits or gains, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section :

Provided that the tax shall be charged at the rate at which it would have been charged had the income, profits or gains not escaped assessment, or full assessment, as the case may be."

The question at issue was formulated in the reference as follows :—

"Where the Income-tax officer has, on such materials and informations as are available to him, reason to believe that income from any of the heads of income described under section 6 of the Indian Income-tax Act—in the present instance, from 'business' and 'other sources', which should have been assessed in the year of assessment has escaped assessment, and, as a result of such enquiries and investigations as are possible at that stage, has been

satisfied as stated in paragraph 3 of the statement that a *prima facie* case has been made out against the assessee for assessment under section 34 of the Act, whether, on a true construction of section 34 of the Act, it is not open for the Income-tax Officer to initiate proceedings under section 34, affording at the same time ample opportunities to the assessee to produce such evidence to the contrary as he likes, in the course of the proceedings thus initiated, or, on the other hand, does the section contemplate that the factum of such escapement should have been first proved and definitely found and determined by an independent enquiry, before the Income-tax Officer can assume jurisdiction to re-open the assessment under section 34 ?"

The learned Judges of the High Court criticised this formulation, holding that it was not in proper form and that it was made up of several involved questions connected with each other. They therefore did not render a positive or negative answer to either of the alternative branches of the question, but the judgment of the Court delivered by the learned Chief Justice construes section 34 as requiring the Income-tax Officer to indicate to the assessee the nature of the alleged escapement from assessment and to give the assessee an opportunity of being heard, before the Income-tax Officer decides that income has escaped assessment and before proceeding to exercise his powers under section 34. To put the decision negatively, the Court held that the Income-tax Officer was not entitled to exercise his powers under the section unless he had first held a quasi-judicial enquiry to which the assessee had been convened. The question now is whether that decision is well founded in law.

Though the appeal is concerned with a general question of the construction of section 34, it is necessary for a clear understanding of it that the facts which give rise to it should be briefly explained under reference to other material provisions of the Act which were in force in 1932-33, the year of assessment. These provisions are to be found in sections 22 and 23 of the Act. Under section 22(2) the Income-tax Officer must serve notice on any person, other than a company, whose total income is in the Income-tax Officer's opinion of such an amount as to render such person liable to income tax, requiring him to furnish a return in the prescribed form of his total income during the previous year. Sub-section (4) authorises the Income-tax Officer to serve on any person upon whom a notice has been served under sub-section (2) a further notice requiring him to produce accounts and documents, subject to the limitation that

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he shall not require the production of any accounts relating to a period more than three years prior to the year previous to the year of assessment. Section 23 provides for the making of the assessment. Sub-section (1) requires the Income-tax Officer, if he is satisfied that the return made under section 22 is correct and complete, to assess the total income and to determine the sum payable. Under sub-section (2) if the Income-tax Officer has reason to believe that the return is incorrect or incomplete he must serve on the person who made the return a notice requiring him either to attend at the Income-tax Officer's office or to produce any evidence relied on in support of the return. Sub-section (3) provides that the Income-tax Officer, after hearing such evidence as the person who made the return may produce and such other evidence as the Income-tax Officer may require on specified points, shall by an order in writing assess the total income and determine the sum payable. Sub-section (4) makes provision for an assessment by the Income-tax Officer to the best of his judgment if the assessee fails to make a return or to comply with the terms of the notices issued to him. This whole procedure, it may be recalled, not only applies on first assessment but is also prescribed by section 34 if for any reason income, profits or gains have escaped assessment or have been assessed at too low a rate.

In the present case the procedure under section 22 was put into operation by the Income-tax Officer and the respondents in reply to the notice issued under sub-section (2) made a return in which they entered under the head "business, trade, commerce, etc." a loss of Rs. 8,54,385. The Income-tax Officer accepted the return as correct and complete and on the 23rd December, 1932, assessed the total income of the respondents at nil for the year 1932-33. But at the beginning of January, 1934, the Income-tax Officer received information that the account books of the assessees produced before the department had always been manipulated, that a comparison of the cash book with the bank pass books within recent years would show that they did not agree and that large sums of money which had been shown as received by the assessees in their bank pass books were not entered in the cash book. Specific instances of some of these discrepancies and inaccuracies were supplied by the informant. This naturally gave the Income-tax Officer food for thought, and after receipt of the information and before issuing notice under section 34 he made such enquiries as were possible about the truth of the information. These enquiries were informal and *ex parte*. As a result of them the Income-tax

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Officer was satisfied (1) that the allegations of discrepancies between the assessees' books of accounts produced at the assessment and some of the entries in their bank pass books were not without foundation; (2) that the assessees had withheld or suppressed relevant facts and information and thereby deliberately misled the Income-tax Officer; and (3) that a *prima facie* case that some income chargeable to Income-tax had escaped assessment was made out. Accordingly on 5th February, 1934, the Income-tax Officer made an order directing notice to issue under section 22(2) read along with section 34, and on 8th February, 1934, a notice was issued to the respondents in these terms :—

"Whereas I have reason to believe that your income from business and other sources which should have been assessed in the financial year ending the 31st March, 1933 has wholly escaped assessment and I therefore propose to assess the said income that has escaped assessment. I hereby require you to deliver to me, not later than the 9th March, 1934 or within 30 days of the receipt of this notice, a return in the attached form of your income from all sources which was assessable in the said year ending the 31st March, 1933."

On 22nd March, 1934, the respondents filed a new return showing the same loss as was shown in the original return. The Income-tax Officer on 21st May, 1934, issued further notices under section 22(4) and 23(2) and thereafter further procedure followed, including applications by the respondents to the High Court for the purpose of preventing the Income-tax Officer from proceeding with a new assessment, on the ground, *inter alia*, that section 34 had been put into operation without giving the respondents an opportunity of being heard. It is not, however, necessary to discuss these proceedings, because eventually the convenient and competent course was taken of staying proceedings under section 34 till the question at issue should be settled on a case stated under section 66(1) of the Act.

Learned Counsel for the respondents submitted an argument that the facts alleged did not bring the case within the scope of section 34. This is an argument which is not open to the respondents on the terms of the reference, which assume a case that falls within the terms of section 34 and on that assumption raise the general question, what on a sound construction of the section is the duty of the Income-tax authorities before issuing a notice under section 22.

Section 34 is unhappily and even ungrammatically phrased. It

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is expressed impersonally, and it fails to state by whom and by what procedure it is to be established that income, profits or gains have escaped assessment or have been assessed at too low a rate. There is fortunately no dispute that the person who must make that decision is the Income-tax Officer, for, apart from the assessee, no one else is in a position to say whether income has been assessed or at what rate it has been assessed. The omission to prescribe expressly what the nature of the decision should be and by what procedure it must be reached is all the more surprising because in other sections of the Act the legislature has been careful to define what is necessary in these respects. This circumstance was founded on by the learned Counsel for the respondents, who pointed out that where some fact had to be established merely *prima facie* to the satisfaction of the Income-tax Officer in the *bona fide* exercise of his discretion, this was expressed by such phraseology as "When it appears to the Income-tax Officer", or "if the Income-tax Officer has reason to belive." On the other hand, when the statute requires that the Income-tax Officer ahall make a decision, which is final so far as he is concerned, upon a matter of fact, the usual expression is "if he is satisfied." When that expression is used, however, express provision is also made whereby the interested parties may be heard either by the Income-tax Officer himself (section 25A and section 28) or by the Assistant Commissioner (section 23A) before any definitive action is taken. In one place (section 26) the formula is "where it is found", but in this instance the decision is made by the Income-tax Officer in the course of making an assessment and when an enquiry under section 23 is open. Learned Counsel for the respondents maintained that in a taxing Act the construction more favourable to the assessee should be preferred and he suggested that section 34 should be read as if it were introduced by the words "If the Income-tax Officer is satisfied" or the words "If it is found". But this suggestion is not in itself helpful to the respondents, since the words proposed to be implied do not carry with them by a further implication a direction to hold a quasi-judicial enquiry; and the real question is whether the section should be read subject to an implied *proviso* that the Income-tax Officer shall not apply the procedure prescribed by the section except after a decision taken in a quasi-judicial enquiry.

The section, although it is part of a taxing Act, imposes no charge on the subject, and deals merely with the machinery of assessment. In interpreting provisions of this kind the rule is

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that that construction should be preferred which makes the machinery workable, *ut res valeat potius quam pereat.* In the present instance two considerations are in their Lordships' opinion decisive. First, no powers are imposed by the section on the Income-tax Officer to convene the assessee, or to issue notices calling on him to produce documents, though these powers are essential if the Income-tax Officer is to conduct a quasi-judicial enquiry before deciding that profits have escaped assessment or have been assessed at too low a rate. In *Rex.* v. *Kensington Income Tax Commissioners* (1), section 52 of the Taxes Management Act 1880 (now section 125 of the Income Tax Act 1918) came under consideration of the Divisional Court. It was contended on behalf of the subject tax payer that the section imposed as a condition precedent to the operation of the section an obligation on the part of the suveyor to obtain legal evidence that the return was defective. The words to be construed were "if the suveyor discovers that any properties or profits chargeable to tax have been omitted from the first assessment". Rejecting this contention Lush J. said :

"It is certainly remarkable that the statute . . . contains no machinery for enabling the surveyor to obtain the evidence which it is said he must obtain before his jurisdiction under the section arises. He is not a judicial officer ; he has no power to compel witnesses to give evidence, or to administer an oath if they are willing to give evidence. He has no means of obtaining that evidence without which, according to the contention, the jurisdiction does not arise."

The decision of the Divisional Court in that case ultimately turned on a question not material to the present issue. It was reversed by the Court of Appeal ([1914] 3 K. B. 429) but the Court of Appeal did not differ from the observations of Lush J. cited above, as is made clear by the judgment of Pickford L. J. (at p. 445). Caution is necessary in applying decisions on a British Income Tax Act to the Indian Income-tax Act, but the reasoning of Lush J. is general and is not affected by specialties of the British Act. It is apposite to the respondents' contention in the present case. Their Lordships are of opinion, in accordance with that reasoning, that it cannot be a condition precedent to the operation of section 34 that the Income-tax Officer should hold a quasi-judicial enquiry, because the powers necessary for such

(1) [1913] 3 K. B. 870.

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an enquiry are not conferred upon him. But there is a second consideration which is no less conclusive. The operative part of section 34 empowers the Income-tax Officer to proceed *de novo* under sub-section 2 of section 22, and that in turn leads, if there should still be a question of the accuracy of the return, to an enquiry under section 23 (2) and (3), and in that enquiry the assessee has a statutory right to appear and to produce evidence. Therefore a construction of section 34 which requires a quasi-judicial enquiry to be held before the powers under the section can be operated would result in mere duplication of procedure and in two enquiries of the same kind, into the same matter, conducted by the same official, and without any advantage to the parties. A construction so unreasonable and unpractical ought not to be preferred when another construction is open. Accordingly their Lordships are of opinion that the Income-tax Officer is not required by the section to convene the assessee, or to intimate to him the nature of the alleged escapement, or to give him an opportunity of being heard, before he decides to operate the powers conferred by the section. In the opinion of their Lordships the view which the learned judges of the High Court have taken of the section is too narrow, and the notice sent to the respondents on 8th February, 1934, is in form a competent preliminary to a new assessment.

The question in the reference is so framed that an answer to the first branch in the affirmative and to the second branch in the negative might be misleading and fail to give exact effect to the opinion of their Lordships. Their Lordships think that the proper answer to be given is that to enable the Income-tax Officer to initiate proceedings under section 34 it is enough that the Income-tax Officer on the information which he has before him and in good faith considers that he has good ground for believing that the assessee's profits have for some reason escaped assessment or have been assessed at too low a rate. The result is that their Lordships will humbly advise His Majesty that the appeal should be allowed, and that the order of the High Court should be set aside. The respondents should pay the appellant's costs in the proceedings on the reference before the High Court and before the Board.

Solicitor, India Office : Solicitor for the Appellant.

Stanley, Johnson and *Allen* : Solicitors for the Respondents.

R. C. C. *Appeal allowed.*

FEDERAL COURT.

PRESENT: *Sir Maurice Gwyer, Knight, Chief Justice, Mr. Justice S. M. Sulaiman, and Mr. Justice S. Varadachariar.*

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March, 18.

JAIGOBIND SINGH AND OTHERS

v.

LACHMI NARAIN RAM AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT PATNA.]*

Interest—Legal necessity for the rate of interest—Constitutional ground—Burden of proof—Excessive rate of interest—High Court's discretion, when to be interfered with—Bihar Money-lenders (Regulation of Transactions) Act (VII of 1939), section 8—Discretion to exercise powers specified—Loan—Mortgage bond for present loan and the amount found due on settlement of accounts—Interest pendente lite—*Civil Procedure Code (Act V of 1908), Order 34, rule 11.*

Per Varadachariar, J. (C. J. agreeing): Where the parties settle accounts in respect of a pre-existing liability and agree that money borrowed under a later transaction, even from the same creditor, should be applied in discharge of that pre-existing liability, the latter transaction should in law be regarded as a loan by itself, though cash did not actually pass between the parties by way of lending and repayment.

The suit comprised a claim under a mortgage bond, dated 4th October, 1923. This bond was executed to secure repayment of sum of Rs. 2500 and provided for the payment of compound interest with annual rests at Re. 1-1 anna per cent. per mensem. This amount of Rs. 2500 was made up of a sum of Rs. 1500 received in cash to pay off another creditor of the mortgagors and a sum of Rs. 1000 as paid to the mortgagees themselves in discharge of antecedent debts due to them from the mortgagors. The bond gave particulars of the antecedent debts; and after reciting that the amount due up to that date for principal and interest in respect of those debts was Rs. 1047, it provided for the payment of Rs. 1000 out of the loan towards that amount:

Held, that the loan document must be taken to be the bond, dated the 4th October, 1923 and not the earlier documents referred to in it.

Prior to 1929 as to the question whether a Court is bound to allow the contractual rate of interest pendiug litigation, *held* that the special provision in Order 34 of the Code of Civil Procedure had to be applied in preference to the general provision in section 34 of the Code. Till the period for redemption expired, the matter was considered to remain in contract and the interest had to be paid at the rate specified in the contract.

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Jagannath Prosad Singh Chowdhury v. *Surajmul Jalal and others* (1) referred to.

After the insertion of new rule 11 to order 34 of the Code of Civil Procedure by Act XXI of 1929, it is no longer absolutely obligatory on the Courts to decree interest at the contractual rate up to the date of redemption in all circumstances, if there be no question of rate being penal, excessive or substantially unfair within the meaning of the Usurious Loans Act, 1918.

Sripat Singh and others v. *Naresh Chandra Bose and others* (2) referred to.

The burden does not in the first instance lie on the mortgagors to show that the rate of interest was necessarily excessive.

The Courts when dealing with the question of legal necessity should record an express finding that there was legal necessity not only for the amounts borrowed, but also for the rate of interest agreed upon.

In this case the interest payable to the plaintiffs up to the date of the institution of the suit will be limited to Rs. 2500. The principal amount will carry simple interest at 12 per cent. per annum from the date of the institution of the suit to the date fixed for payment. After that date, there will be interest at 6 per cent. per annum on the aggregate amount of principal, interest and costs up to date of realisation.

Per Sulaiman, J. : Whether Court would or would not give relief in respect of interest in excess of 9 per cent. simple interest per annum, and if so to what extent, depends on the special circumstances of each case.

Although one of the previous debts had in part been based on promissory note, the present suit is based on a mortgage deed and as section 7 of the Bihar Money-lenders Act, 1939 applies only to suits on promissory notes, it was considered unnecessary to consider the objection whether section 7 was *ultra vires* of the Provincial Legislature when the point did not directly arise or had been fully argued.

The findings as to legal necessity for the rate of interest being not on constitutional ground and the appellants neither appealed for nor obtained the certificate referred to in Order 45 rule 2 Civil Procedure Code, they are not entitled to argue the question of legal necessity as of right. The Federal Court may, however, grant leave under section 205(2) of the Constitution Act.

Federal Court Case No. 10 of 1939.

Appeal by the Defendants.

Mr. Raghbir Singh (Advocate, Federal Court) with ***Messrs. A. C. S. Chari*** (Advocate, Federal Court) ***Sarju Prasad*** and ***Rameswar Misra*** (Advocates, Patna High Court) instructed by ***Mr. T. K. Prasad*** Agent, for the Appellants.

(1) (1926) 45 C. L. J. 279 ; L. R. 54 I. A. 1 ; A I. R. 1927 Calc. P. C 1.
(2) A. I. R. 1932 Pat. 332 (334).

Mr. Rajkishore Prasad (Advocate, Federal Court) instructed by *Mr. Tarachand Brijmohanlal*, Agent, for the Respondents.

The following judgments were delivered:

Sulaiman, J. :—This appeal arises out of a suit brought to enforce two simple mortgage deeds, dated 4th October, 1923, and 24th April, 1930, for Rs 2,500 and Rs. 1,800 respectively, carrying interest at Rs. 1-1 anna per cent. per mensem compounded every year. Most of the points which arise in this case are fully covered by our decision in Case No. 9 of 1939, decided to-day. [*Surendra Prosad Narain Singh* v. *Sri Gajadhor Prosad Sahu Trust Estate* (1).] It is, therefore, necessary to deal with only the new points which have been raised in this appeal and which deal principally with the liability for interest. On behalf of the appellants it has been argued that the findings of the Courts below as regards legal necessity for the rate of interest, are inadequate. In the first place, strictly speaking, this is not a constitutional ground at all, and as the appellants neither appealed for nor obtained the certificate referred to in Order XLV, Rule 2, Civil Procedure Code, they are not entitled to argue it as of right. This Court may, however, grant leave under section 205(2) of the Act. In the second place there are, at any rate by implication, concurrent findings of both the Courts that there was legal necessity for the rate of interest agreed upon.

The trial Court dealt with the question of legal necessity under issue No. 4, relating to the legal necessity for the debt, without expressly considering whether legal necessity for the rate of interest also had been established. It considered the rate of interest under issue No. 5, relating to the question of its being excessive and penal. The finding was against the defendants. The High Court also did not consider this matter under the head legal necessity, but considered it under the head rate of interest. As regards the first mortgage deed. It was pointed out that the earlier mortgage deed and bonds carried compound interest at Rs. 1-8 annas per cent. per mensem, with yearly rests. There was only one earlier promissory note for Rs. 50 carrying simple interest at Rs. 1-8 annas per cent. per mensem. In the opinion of the High Court the fresh transaction at compound interest, at Rs. 1-1 anna per cent. per mensem with yearly rests, was quite a prudent one. It was further pointed out that in the plaint the plaintiffs had claimed compound interest at the rate of Re. 1 per cent. per mensem. As regards

(1) (1940) 71 C. L. J. 557.

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the second mortgage, the High Court pointed out that the plaintiffs' evidence showed that the usual rate of interest had varied from 1 to 2 per cent. per mensem, compoundable every year, which received support from the earlier transactions, and that there was no reliable evidence on the defendants' side to prove that such compound interest was excessive. No doubt, strictly speaking, the Courts when dealing with the question of legal necessity should have recorded an express finding that there was legal necessity not only for the amounts borrowed, but also for the rate of interest agreed upon. The burden did not in the first instance lie on the defendants to show that the rate of interest was necessarily excessive. But presumably the case was not argued before the High Court from this standpoint, and in any case it appears that the High Court was satisfied that the first transaction was quite prudent and, therefore, the second transaction also, which involved the same rate of interest, was equally good. The trend of the High Court's opinion seems to be that there was legal necessity for the rate of interest agreed upon.

It is pointed out on behalf of the appellants that the original amount of the first mortgage deed, which had also included interest for a previous period, was only for Rs. 2,500 while the plaintiffs claimed over Rs. 11,000 at the date of the suit. Similarly they were claiming about double the amount on the second deed. The trial Court had no occasion at all to consider the re-opening of the transaction under the old section 12, as the Act came into force after the case was decided by it. It is, therefore, contended that the High Court was wrong in not applying section 12 of the old Money-lenders Act on the ground that it had "a complete discretion." It is argued that discretion is not arbitrary but must be exercised judicially. The High Court has, however, said that upon the facts of this case there is nothing which would justify the Court, in the exercise of its discretion, in re-opening the accounts. It, therefore, appears that the High Court did consider this point but did not think it fit to re-open the transaction. The grounds which might have influenced the High Court were probably those discussed earlier when considering the rate of interest. When the question was one of a discretion of the High Court we cannot in appeal interfere with the way in which the discretion was exercised or not exercised, unless it appears that the High Court did not apply its mind at all to the question, or acted capriciously or in disregard of any legal principle, or was influenced by some extraneous considerations wrong in law. If there can be no legal

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objection to the way in which discretion has or has not been exercised by the High Court, then we would not in appeal substitute our own discretion for that of the High Court. *Rehmatnissa Begam* v. *Price* (1).

It is then argued that the High Court had really no discretion in the matter and should have acted under the old section 12 to which section 8 of the new Act applies. It is argued that the word "may" in the opening portion of the section has the meaning of the word "shall", and that the Court has the option of exercising all or any of the three powers mentioned therein, but has no power not to exercise any of the three powers at all. This contention cannot be accepted. While the word "may" occurs in the opening portion of the section, the word "shall" occurs in the Proviso, and these two words must have distinct meanings. It also appears that the Legislature has advisedly used the word "may" in some sections like 10 and 11, while it has deliberately used the word "shall" in sections like 4, 5, 6 and 7 and also 13 and 14. The policy of the Act clearly appears to be to prohibit rate of interest in excess of 9 per cent. per mensem for secured loan advanced after the Act came into force (section 5) and to prohibit compound interest altogether for loans advanced after the Act (section 6). On the other hand, as regards previous loans, section 7 creates a bar against interest exceeding the principal, and section 8 gives a discretion to the Court to give other reliefs according to circumstances. Obviously by the use of the word "may" it is intended that the court should consider the circumstances of each case and then decide whether it should or should not exercise all or any of the three powers mentioned in the section. Had the intention been as contended for on behalf of the appellants, the language would have been 'the court shall exercise all or any of the following powers'. The use of the word "may" indicates that the court is not bound to exercise at least one of the powers, and may well not exercise any of the powers at all. The language as it stands can mean only this that the court has the discretion to exercise all or any or none of the specified powers.

A further point has been urged on behalf of the respondents that the new section 7 is *ultra vires* of the Provincial Legislature. The argument is as follows:—Quite apart from any question of repugnancy, which is cured by the assent of the Governor-General, section 7 has been enacted to reduce interest on all

(1) (1917) L. R. 45 I. A. 61; 27 C. L. J. 623.

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loans including loans based on a document. Now a loan based on cheques, bills of exchange, promissory notes and other like instruments, would be a loan based on a document within the meaning of the section and would be governed by the prohibition contained in it. But "cheques, bills of exchange, promissory notes and other like instruments" fall under List I, Entry No. 28, of the Seventh Schedule, and are within the exclusive powers of the Federal Legislature. By virtue of section 100 read with section 316, it follows that the power of the Provincial Legislatures to make enactments in respect of these documents is wholly excluded. If the provisions of section 7 would be void in such particular cases, then the whole section must be deemed to be altogether void.

Although one of the previous debts had in part been based on a promissory note, the present suit is based on a mortgage deed and not on a promissory note and the field is therefore apparently clear. The period of limitation being short, section 7 would rarely apply to suits on promissory notes. It is accordingly unnecessary to consider the objection in detail in this case, particularly as the point does not directly arise, nor has it been fully argued before us. Even the Full Bench case of the Madras High Court, *Mada Namaratnam* v. *Puvvada Seshayya* (1) was not cited at the Bar.

Lastly, a question has been raised whether we are bound to allow the contractual rate of interest *pendente lite.* Prior to 1929 the position was that there was the general section 34 Civil Procedure Code, under which in a decree for payment of money the court had full discretion to order interest at such rate as it deemed reasonable to be paid on the principal sum adjudged from the date of the suit onwards. Then there were Rules 2 and 4, of Order XXXIV, which applied to a mortgage suit, and the court had to order an account to be taken of what was due to the plaintiff at the date of such decree for principal "and interest on the mortgage". According to section 57-A of the Transfer of Property Act, mortgage money also included the interest on the principal secured by the mortgage. The special provision in Order XXXIV had to be applied in preference to the general provision in section 34. Till the period for redemption expired, the matter was considered to remain in contract and the interest had to be paid

(1) [1939] M. L. J. 278.

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at the rate specified in the contract. *Jagannath Prosad Singh Chowdhury* v. *Surajmul Jalal and others* (1).

By Act XXI of 1929, Order XXXIV was amended, and a new Rule 11 was inserted, which deals specially with interest, and provides that the court "may" order payment of interest to the mortgagee up to the date fixed for payment at the rate payable on the principal. It follows that this special provision, which removes any conflict that there might have been between section 34 and Order XXXIV, Rules 2 and 4, gives a certain amount of discretion to the court, so far as interest *pendente lite* and subsequent interest are concerned. It is no longer absolutely obligatory on the courts to decree interest at the contractual rate up to the date of redemption in all circumstances, if there be no question of the rate being penal, excessive or substantially unfair within the meaning of the Usurious Loans Act, 1918. See *Sripat Singh and others* v. *Naresh Chandra Bose and others*, (2) although in this case when considering Order XXXIV, Rule 2, the Privy Council case of *Jagannath Prosad Singh Chowdhury* v. *Surajmul Jalal and others* (1), was overlooked. In *Jagdish Jha and others* v. *Aman Khan* (3) interest after the institution of the suit was ordered by this Court to be paid at the rate of 6 per cent. per annum on the principal amount till the date fixed for payment. In my opinion the view then taken as to the power of a court to reduce interest *pendente lite* was not contrary to law.

The Bihar Legislature, as shown by the Preamble of Act III of 1938, in order to give relief to debtors has inaugurated a new policy by regulating money-lending transactions. Section 6 makes any contract for the payment of compound interest after the Act came into force altogether void. Section 7 disallows interest up to suit in excess of the amount of the principal. Section 8 gives power to the Court to reopen the whole transaction and give relief in respect of interest in excess of 9 per cent. simple per annum in the case of a secured loan notwithstanding any contract to the contrary. The power of the Court to reduce interest in Bihar has, therefore, become much wider than that under the the Usurious Loans Act. It may not be quite in harmony with these new provisions to go back to the old practice or the old standard of high rates of interest, which were freely allowed. It may even be contrary to the spirit of the Bihar Act now to allow

(1) (1926) 45 C. L. J. 279; L. R. 54 I. A. 1 A. I. R. 1927 Calc. P. C. 1.
(2) A. I. R. 1932 Pat. 332 (334).
(3) (1939) F. L. J. 7 (9); 71 C. L. J. 55.

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compound interest at a high contractual rate not only during the pendency of the suit but even up to six months after the preliminary decree to be passed hereafter.

Of course, whether the Court would or would not give relief in respect of interest in excess of nine per centum simple per annum, and if so to what extent, will depend on the special circumstances of each case. The opinion of the High Court on such a matter must carry weight, where, being conscious of its discretionary power under section 8, it has considered the case not to be a fit one for the exercise of such power. Just as in Case No. 13 decided to-day, the *pendente lite* interest should be reduced to 12% p. a. simple.

Varadachariar J.—I wish to add a few words, with reference to the argument urged on behalf of the appellants as to the manner in which section 7 of Bihar Act VII of 1939 should be applied to one of the loans sought to be recovered in this case. The appellants also sought to invoke the aid of section 8 of that Act, with a view to reopen the settlement of accounts made at the time of the execution of the mortgage bond, Exhibit V. But, as held by the High Court, that section only gives a discretionary power and we have not been shown sufficient reason for interfering with the refusal of the High Court to exercise that power in the circumstances of this case. It is true that in the particular paragraph dealing with this question, the learned Judges have not assigned their reasons; but the reasons are fairly gatherable from the rest of the judgment.

The suit comprised claims under two mortgage bonds, Exhibit V dated 4th October, 1923, and Exhibit V (a) dated 24th April, 1930. The interest due under Exhibit V (a) up to the date of the institution of the suit did not amount to a sum equal to the principal amount of the bond; no question therefore arises under section 7 of Bihar Act VII of 1939 in respect of that bond. The earlier bond, Exhibit V, had been executed to secure repayment of a sum of Rs. 2, 500 and it provided for the payment of compound interest with annual rests at Rs. 1-1-0 per cent per mensem. This amount of Rs. 2, 500 was made up of a sum of Rs. 1, 500 received in cash to pay off another creditor of the mortgagors and a sum of Rs. 1,000 treated as paid to the mortgagees themselves in discharge of antecedent debts due to them from the mortgagors. The bond gave particulars of the antecedent debts; and after reciting that the amount due up to that date for principal and interest in respect of those debts was Rs. 1, 047,

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it provided for the payment of Rs. 1, 000 out of the mortgage loan towards that amount.

With reference to Exhibit V, the learned counsel for the appellants contended that, even under section 7 of Act VII of 1939, the Court must reopen the account in respect of the antecedent debts referred to in Exhibit V and limit the interest claimable by the plaintiffs up to the date of the suit, in respect of this portion of the mortgage debt, to the amount of principal due under the antecedent transactions. I am unable to accede to this contention. The case is certainly one of a "loan based on a document"; and under the concluding words of section 7, interest is in such a case claimable up to the "amount of loan mentioned in the document". The loan document must in this case be taken to be Exhibit V and not the earlier documents referred to in it, because the definition of "loan" in section 2 (f) includes a "transaction on a bond executed in respect of past liability". How exactly this definition and the provision of section 7 are to be applied to ordinary cases of "renewals" it is not necessary for the purposes of this case to decide. Where however, as in the present case, the parties settle accounts in respect of a pre-existing liability and agree that money borrowed under a later transaction, even from the same creditor, should be applied in discharge of that pre-existing liability, it seems to me that the later transaction should in law be regarded as a loan by itself, though cash did not actually pass between the parties by way of lending and repayment [see observations of Greer L. J., as he then was, in *Lyle* v. *Chappell* (1) referred to with approval by the Judicial Committee in *Chethambaram Chettiar* v. *Loo Thon Poo* (2).

The appeal is allowed and the decree of the courts below modified to this extent, viz. that the interest payable to the plaintiffs up to the date of the institution of the suit in respect of Exhibit V will be limited to Rs. 2,500. The question of interest *pendente lite* has been dealt with in Case No. 13 of 193 . On both the bonds, the principal amounts will carry simple interest at 12 per cent per annum from the date of the institution of the suit to the date fixed for payment in the revised decree to be passed by the High Court. After that date, there will be interest at 6 per cent. per annum on the aggregate amount of principal, interest and costs up to date of realisation. The case will be remitted to the High Court for a revised decree being passed on the above basis. The plaintiffs-respondents will retain the costs

(1) L. R. (1932) 1 K. B. 691. (2) (1940) 1 M. L. J. 68 at p. 72.

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awarded to them by the decrees of the High Court and of the Trial Court. There will be no order as to costs in this Court.

The appellants' learned counsel applied for an order under section 10 of the Bihar Act of 1939 permitting payment by instalments. The appellants will be at liberty to make the application before the High Court which has to pass the decree.

Gwyer, C. J. :—I concur and have nothing to add.

A. T. M. *Appeal allowed : Decree modified.*

PRESENT : *Sir Maurice Gwyer, Knight, Chief Justice, Mr. Justice S. M. Sulaiman and Mr. Justice S. Varadachariar.*

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March, 18.

SUBHANAND CHOWDHURY AND ANOTHER

v.

APURBA KRISHNA MITRA AND ANOTHER.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT PATNA.]

Jurisdiction—Jurisdiction of Federal Court, when arises—Civil Procedure Code (Act V of 1908), Sec. 152, O. 34, R. 11—Inherent power—Alteration of correct decree or certificate—Happening of subsequent event—Vacating certificate—Appeal, when not entertainable by Federal Court—Jurisdiction of Federal Court, if can be divested in favour of Privy Council—Interest pendente lite.

The granting of a certificate is the necessary condition precedent to the exercise of its jurisdiction by the Federal Court.

There is no inherent power to alter a decree or a certificate, which was correct at the time when it was made or given, because of the happening of some subsequent event.

If the High Court had no power to vacate its certificate, the Federal Court has no power to do so.

The Federal Court will not entertain appeals which have no relation to existing rights created or purported to be created or to express opinions on subjects which are no longer of any practical interest.

Attorney-General for Alberta v. *Attorney-General for Canada* (1) referred to.

(1) [1939] A. C. 117 (122, 128).

When jurisdiction to hear an appeal is once vested in the Federal Court by the grant of a certificate, it cannot be divested by any subsequent event ; e. g. by the action of a Provincial Legislature.

Once a certificate has been granted, an appellant can appeal on any ground whatsoever, if the Court thinks fit to give him leave to do so.

Obiter : The jurisdiction of Federal Court to entertain the appeal on those other grounds would not be excluded even if an appellant declined to argue before the Federal Court that the decision of the High Court on the constitutional question with respect to which the certificate had been granted was wrong.

The date of the judgment of the High Court and of their certificate was 17th January, 1939. On 1st May, 1939, the Bihar Money-lenders (Regulation of Transactions) Act, 1939, came into force. The application of the appellant to the High Court for admission of their appeal to the Federal Court was made on the 11th May and the appeal was finally admitted by the High Court on the 2nd October, 1939. The Act of 1939 repealed and re-enacted section 11 of the Bihar Money-lenders Act, 1938. The certificate under section 205(1) granted on the 17th January, 1939 certified that the case involved a substantial question of law as to the interpretation of the Constitution Act, that question being whether section 11 of the Bihar Money-lenders Act, 1938, was void under section 107 of the Constitution Act, because repugnant to an existing Indian law, namely section 2 of the Usury Laws Repeal Act, 1855, section 3 of the Usurious Loans Act, 1918 and also section 37 of the Indian Contract Act, 1872 :

Held, that though the question of law as to the validity of section 11 ceased to exist at the beginning of May, when the new Act of 1939 came into force, as the Act was retrospective, the Federal Court and not the Privy Council had jurisdiction to hear the appeal. The certificate granted by the High Court on 17th January, 1939, conferred jurisdiction to hear the appeal and that jurisdiction had not been taken away from the Federal Court by reason of the alteration of circumstances. It was quite immaterial that the relief now claimed by the appellants arose from an Act which was not law when the certificate was granted.

Quære : Whether the appellants had also a vested right under the Act of 1938, which was saved to them by section 8 of the Bihar General Clauses Act, notwithstanding the repeal of the Act of 1938 by the Act of 1939.

As regards interest *pendente lite*, this is governed in the case of mortgage actions by order 34, rule 11 of the Code of Civil Procedure.

In the present case having regard to all the circumstances, the Court thinks that the justice in the case will be met by allowing the plaintiffs simple interest at 12 per cent. per annum in respect of the principal sum due on the bonds from the dates of execution to the date fixed for payment in the decree. From the latter date the aggregate amount due for principal, interest and costs will carry interest at 6 per cent. per annum till the date of realisation or payment.

Federal Court Case No. 13 of 1939.

Appeal by the Defendants.

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The material facts appear from the judgment.

Mr. B. B. Tawakley (Senior Advocate, Federal Court) with *Major Surendropal Singh* (Advocate, Federal Court) instructed by *Mr. T. K. Prasad*, Agent, for the Appellants.

Sir Brojendra Mitter (Advocate-General of India and Senior Advocate, Federal Court) with *Mr. Raghbir Singh* (Advocate, Federal Court) instructed by *Mr. B. Banerji*, Agent, for the Respondents.

Respondent No. 2 did not enter appearance.

The following judgment was delivered:

March, 18.

In this case the facts do not differ materially from others which have come before us lately from Bihar; but the Advocate-General of India, on behalf of the respondents, has raised a novel and interesting point.

The plaintiffs (the present respondents) obtained a decree in the Court of the Subordinate Judge, Muzaffarpur, and the decree (with certain modifications in their favour) has been upheld in the High Court. The defendants' claim to have the benefit of section 11 of the Bihar Money-lenders Act, 1938, was rejected, since that provision had already been held by the High Court to be void: *Sadanand Jha* v. *Aman Khan* (1); but the High Court granted a certificate under section 205(1) of the Constitution Act.

The date of the judgment of the High Court and of their certificate was 17th January, 1939. On 1st May, 1939, the Bihar Money-lenders (Regulation of Transactions) Act, 1939 (Act VII of 1939), came into force. The application of the appellants to the High Court for admission of their appeal to the Federal Court was made on the 11th May, and the appeal was finally admitted by the High Court on the 2nd October last. The Act of 1939, which has been before this Court in several cases during the present sittings, repealed and re-enacted section 11 of the Bihar Money-lenders Act, 1938, and since it had been reserved for the considertion of the Governor-General and had received his assent, its validity cannot be challenged as that of the Act of 1938 had been.

Such are the facts of the case, and the Advocate-General admitted that, if the appeal were properly constituted, the appellants would be entitled to the benefit of the Act of 1939; but he contended that there was no appeal properly before the Court. He put his argument in this way. The certificate under section 205(1), granted on 17th January, certified that the case involved a substantial question of law as to the interpretation of the Constitution

(1) (1939) I. L. R. 18 Pat. 13.

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Act, that question being (or so it is to be presumed, for the certificate does not mention any particular question of law) whether section 11 of the Bihar Money-lenders Act, 1938, was, as the High Court had held in their earlier decision, void under section 107 of the Constitution Act, because repugnant to an existing Indian law, viz. section 2 of the Usury Laws Repeal Act, 1855, section 3 of the Usurious Loans Act, 1918, and possibly also section 37 of the Contract Act, 1872. The Advocate-General admitted that on the day when this certificate was granted it was a good and valid certificate, and that the appellants were entitled at that time to appeal to this Court not only on the question as to the validity of section 11 of the Act of 1938, but also on any other ground mentioned in section 205(2) of the Constitution Act. But, he said, the question of law as to the validity of section 11 ceased to exist at the beginning of May, when the new Act of 1939 came into force; and, since the Act was retrospective, the certificate had become, to use his own expression, " infructuous " and ineffective. Accordingly, he argued that this Court had no longer jurisdiction to hear the appeal, either on the constitutional or on any other ground, since an effective certificate alone is the foundation of the Court's jurisdiction; and that the appellants must seek their remedy, if any, before the Judicial Committee. He also pointed out that the object of the appeal now is to obtain the benefit of the Act of 1939, that is to say, of a law which was not yet in existence when the certificate was granted by the High Court.

Section 205 of the Constitution Act is in the following terms:—

" 205.—(1) An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any Order in Council made thereunder, and it shall be the duty of every High Court in British India to consider in every case whether or not any such question is involved and of its own motion to give or to withhold a certificate accordingly.

(2) Where such a certificate is given, any party in the case may appeal to the Federal Court on the ground that any such question as aforesaid has been wrongly decided, and on any ground on which that party could have appealed without special leave to His Majesty in Council if no such certificate had been given, and, with the leave of the Federal Court, on any other ground, and no direct appeal shall lie to His Majesty in Council, either with or without special leave. "

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The granting of a certificate is thus the necessary condition precedent to the exercise of its jurisdiction by this Court; and it sets in motion a train of consequences. No provision is made for the cancellation or vacating of a certificate after it has once been granted. The Advocate-General did indeed suggest that the High Court had power in appropriate circumstances to vacate a certificate under section 151 or section 152 of the Code of Civil Procedure. He abandoned the suggestion however before the conclusion of his argument, and in our opinion he was prudent to do so. Plainly section 152 of the Code has no application to such a case as the present, and there can be no inherent power to alter a decree or certificate, which was correct at the time when it was made or given, because of the happening of some subsequent event.

If the High Court had no power to vacate its certificate, this Court has certainly no power to do so. Can it then treat an existing certificate as having become "infructuous", because the constitutional question with respect to which it was given subsequently becomes of no more than academic interest? The Advocate-General referred to the observations of the Judicial Committee in *Attorney-General for Alberta* v. *Attorney-General for Canada* (1), where the Lord Chancellor stated that it was the practice of the Committee not to entertain appeals which have no relation to existing rights created or purported to be created or to express opinions on subjects which are no longer of any practical interest. In our opinion it would be convenient for this Court to follow the same practice; and we have in an earlier case declined to hear arguments on the validity of the repealed Bihar Act of 1938. But we are not now considering the convenience or otherwise of a particular practice; we are considering a question of jurisdiction. The certificate granted by the High Court on 17th January, 1939, admittedly conferred jurisdiction on this Court to hear the appeal; and we have to determine whether that jurisdiction has been taken away from us, by reason of the alteration of circumstances. In our opinion, when jurisdiction to hear an appeal is once vested in this Court by the grant of a certificate, it cannot be divested by any subsequent event. A certificate is the key which unlocks the door into this Court, and a litigant who has once passed through that door cannot afterwards be ejected by the happening of events outside and beyond his control. It seems to us quite immaterial that the relief which the appellants now claim arises from an Act which was not law when the certificate was granted. Section

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205 (2) is plain ; and once a certificate has been granted, an appellant can appeal on any ground whatsoever, if the Court thinks fit to give him leave to do so. Nor do we think, though it is not necessary to decide the point, that the jurisdiction of this Court to entertain the appeal on those other grounds would be excluded, even if an appellant declined to argue before us that the decision of the High Court on the constitutional question with respect to which the certificate had been granted was wrong.

It is sufficient for us to base our judgment on what we conceive to be the true construction of section 205 of the Constitution Act, and we do not think it necessary to decide whether the appellants had also a vested right under the Act of 1938, which was saved to them by section 8 of the Bihar General Clauses Act, notwithstanding the repeal of the Act of 1938 by the Act of 1939.

The facts in the present case are unusual and are unlikely to recur. We do not suppose that Parliament ever contemplated a contingency of the kind ; but that is no reason why we should not give effect to the plain language of the Act. Nor could we lightly adopt a construction which would have this result, that an appeal properly begun and continued in this Court was suddenly, by the action of a Provincial Legislature, taken out of our jurisdiction and transferred to the jurisdiction of the Judicial Committee

In our opinion therefore this Court has jurisdiction to entertain the appeal. The appellants' counsel did not argue any grounds of appeal other than the application of the Bihar Act of 1939, and, as we have already said, the Advocate-General of India, on behalf of the respondents, admitted that, if the appeal were properly constituted and this Court had jurisdiction, the appellants were entitled to the benefit of the Act. We accordingly allow the appeal to the extent of reducing the interest payable to the plaintiff up to the date of the institution of the suit to Rs. 8,500 in respect of the first mortgage bond, Exhibit I, and to Rs. 3,995 in respect of the second bond, Exhibit I(a). As regards interest *pendente lite*, this is governed in the case of mortgage actions by O. XXXIV, r. 11, of the Code of Civil Procedure, which provides that the Court may order payment of interest, up to the date on or before which payment of the amount found due under the preliminary decree to be made by the mortgagor, at the rate payable on the principal, or where no such rate is fixed at such rate as the Court may deem reasonable ; and it is to be observed that though this provision has found a place in the Code since 1929, section 7 of

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the Bihar Act of 1939 is expressly limited to interest claimable upto the date of the institution of the suit. The Act has maintained a distinction between loans advanced before the Act and loans advanced subsequently; as regards the latter it has limited the rate of interest (section 5) and has also prohibited compound interest (section 6), while as regards the former it has only limited the aggregate amount of interest payable up to the date of the institution of the suit (section 7). The contract for the payment of interest thus not having been declared illegal, but only unenforceable beyond a certain point, the creditor retains his contractual rights except to the extent to which the statute has expressly limited them. In these circumstances, it may perhaps be open to doubt whether the policy of the Bihar legislation can properly be taken into account by a Court which is considering whether there are any grounds for reducing the rate of interest to which a mortgagee would ordinarily be entitled under the provisions of O. XXXIV, r. 11 of the Code, since this would in effect be to extend the Act to a period with which the Legislature has not chosen to deal; but it may be that the wide powers of re-opening transactions originating before or after the commencement of the Act given to the Court by section 8 of the Bihar Act of 1939 were regarded by the Legislature as conferring a much wider discretion than that given by O. XXXIV, r. 11 or by the Usurious Loans Act, 1918. Having regard to all the circumstances, we think that the justice of the case will be met by allowing the plaintiff (respondent) simple interest at 12 per cent per annum in respect of the principal amount due on both the bonds from December 20th, 1934, to the date fixed for payment in the revised decree to be passed by the High Court. From the latter date the aggregate amount due for principal, interest and costs will carry interest at 6 per cent per annum till the date of realisation or payment.

The case will be remitted to the High Court with a direction to discharge their order dated January 17th, 1939, and the order of the Subordinate Judge, dated March 2nd, 1936, and to pass a decree in the terms above stated. The respondents will retain the costs already awarded to them in the High Court and in the Court below; there will be no order as to costs in this Court.

A. T. M. *Case remanded.*

APPELLATE CIVIL.

Before Mr. Justice Syed Nasim Ali and Mr. Justice B. N. Rau.

RAJNANDINI PURKAYESTHA

v.

ASWINI KUMAR CHOUDHURY AND OTHERS.*

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July, 22, 23, 24, 25, 26, 29, 30, 31.

Adoption—Ambastha—*Adoptive father Sudra—Appellate Court—Testimony of witnesses—Believing witnesses—Custom—Muslim law of pre-emption—Applicability to Hindus of Sylhet.*

In a case involving a question of fact the decision of which depends on the reliance to be placed on the testimony of witnesses, the view of the Judges who tried the case and saw the witnesses is entitled to great weight.

Where the only question is which set of witnesses is to be believed the finding of the trial Judge should not be lightly regarded on a mere calculation of probability by the Court of appeal.

In this case, having regard to the facts and circumstances that even if the ancestor of defendant No. 1's father was Ambastha or Vaishya his family had degenerated and degraded to Sudradom and defendant No. 1 was a Sudra. Hence his adoption by a Kayestha and therefore a Sudra, was valid.

By custom the Hindus of the district of Sylhet are entitled to the benefit of the Muslim law of pre-emption.

Appeal by the Plaintiff.

Suit for declaration that defendant No. 1 was not adopted &c.

The material facts appear from the judgment.

Dr. S. C. Basak and *Mr. Paresh Lal Shome* for the Appellant.

Messrs. Gunada Charan Sen, Nripendra Chandra Das and *Hamidul Huq* for the Respondents.

The judgments of the Court were as follows:

July, 31.

Nasim Ali, J.:—Prasanna Kumar Das of Village Ilashpur in the district of Sylhet was a Kayestha by caste. He married Swarnamayee the sister of Sashi Mohan Das of village Rabidas (Lalkailash) in the said district, a Baidya by caste. He had no son. His only daughter Rajnandini (plaintiff in the present suit) was married to one Mohendra Nath Das. The latter was a *Griha*

*Appeal from Original Decree No. 224 of 1936, against the decree of Tej Chandra Mukherjee, Esq., Subordinate Judge, 2nd Court, of Sylhet, dated the 26th June, 1936.

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Jamata (resident son-in-law). His daughter had no male issue during his lifetime.

Prasanna Kumar was owner of considerable movable and immovable properties. He made his last Will on September 1, 1919. The material terms of this Will are these:

Clause 1. "My .... son-in-law Sriman Mohendra Nath Das Purkayestha shall become the owner in absolute right, of 4 as. (2 ?) share of the 16 annas of my moveable and immoveable properties."

Clause 2. "My only daughter Srimati Rajnandini .... shall become the owner in possession, in absolute right of 4 as. share of the 16 annas of my moveable and immoveable properties."

Clause 3. "Having had no male issue, for the purpose of preserving my family line I became desirous of taking a son in adoption and have brought in Sriman Aswini Kumar Das" (defendant No. 1 in the present suit) "son of Srijut Sashi Nath Choudhury, of Mauja Rabidas, pargana Dulali, to my ancestral dwelling house. On account of ill health, I have not been able up to this day to perform the rites of Pashyajag (sacrificial rites of adoption) duly and according to the Shastras (scriptures) in connection with the taking of a son in adoption. If the said rites remain unperformed owing to my sudden death, then I empower my wife Srimati Swarnamayi Choudhurani to take in adoption on performing the rights of Pashayajag (sacrificial rites of adoption) after my death."

Clause 4. "Afte my death, whenever the rites of Pashyajag (sacrificial rites of adoption) will be performed by my wife from that very time the said Aswini Kumar Das shall become the owner in possession in absolute right, of the remaining 10 annas share of my moveable and immoveable properties. In default thereof, my wife shall remain in possession of the said 10 annas share in the right of enjoyment (for life)".

Clause 6. "If after my death, the said Aswini Kumar be taken in adoption then until he completes the age of 22 years, my son-in-law Sriman Mohendra Nath Das and my widow Srimati Swarnamayee Choudhurani shall be the executors in respect of the management of the aforesaid 10 annas (share) of my moveable and immoveable properties"

Prasanna Kumar died on September 3, 1919.

On October 8, 1920, Swarnamayee and Mohendra applied for probate of his Will.

A son (Kaliprasad) was born to Rajnandini on November 12, 1920.

Probate was granted to Swarnamayee and Mohendra on April 1, 1921.

On January 25, 1923, Swarnamayee, Mohendra and Rajnandini jointly executed a registered Patta (Ex. 9) in favour of one Jafar Mridha for catching fish from certain *beels* appertaining to the estate of Prasanna Kumar for a term of 6 years stating therein that they were owners of the said *beels* in Maliki right.

On September 23, 1924, Swarnamayee died.

In 1930, negotiations started between Rajnandini and Aswini Kumar (defendant No. 1) for an amicable settlement of the dispute between them relating to the title of the 10 annas share of the properties left by Prasanna Kumar. Certain drafts (Ex. 7, Ex. 7A, Ex. 7B, Ex. 7C, Ex. 7D, and Ex. 8) were prepared. The terms of settlement contained in these drafts were these :

"Aswini Kumar will give up his claims to the disputed 10 annas share on receipt of a certain amount. A portion of this amount would be paid in cash and for the balance Mohendra would sell to Aswini certain properties belonging to him."

While these negotiations were going on defendant No. 1 sold to defendants Nos. 2 to 5, 10 annas share of the properties which is the subject-matter of the present suit on July 31, 1931, by a registered deed of sale (Ex. A-1). In this Kobala it is stated that out of the consideration the vendor received Rs. 8,500 in cash on the date of the execution of the Kobala, and that the balance would be paid in two instalments later on.

On December 10, 1931, defendant No. 1 sold to Rajnandini and Mohendra for a consideration of Rs. 23,000 and on the purchasers agreeing to the vender remaining the owner and possessor of two annas share of the lands of Balagunj Bazar his entire interest and share in the properties left by Prasanna Kumar excepting the properties sold by defendant No. 1 to defendants Nos. 2 to 5. Out of the consideration money of Rs. 23,000, Rs. 14,000 was set off against the price of certain properties belonging to Mohendra and sold by him on that day to defendant No. 1. Rs. 2,000 was paid by the purchasers in cash before the Kobala and Rs. 5,000 was paid in cash on the date of the execution of the Kobala. For the balance viz, Rs. 2,000 Mohendra executed a bond in favour of defendant No. 1.

On August 15, 1932, Rajnandini raised the present suit in the Court of the Subordinate Judge at Sylhet.

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The material allegations in the plaint are these :

(1) Swarnamayee had never any intention of taking defendant No. 1 in adoption. Immediately after her husband's death she gave out that she would not take the defendant No. 1 in adoption ; and sent away defendant No. 1 to his father's house. Since then the defendant No. 1 is living in his father's house.

(2) Swarnamayee died without taking the defendant No. 1 in adoption.

(3) The father of defendant No. 1 is a very litigious man and is heavily involved in debts. Being led away by greed and with the evil motive of getting hold of the 10 annas share of the properties left by Prasanna Kumar he himself and his son defendant No. 1 on his advice began to give out and proclaim to the people that defendant No. 1 was the adopted son of Prasanna Kumar. They came to the plaintiff and her husband and requested them to come to a settlement and also threatened them with various sorts of litigation if no amicable settlement were arrived at. Considering that in case of litigation the plaintiff would be put to unnecessary loss and on the other hand in the event of winning litigation there would be no possibility of realising the cost in Court from defendant No. 1 who is without any means and considering that the defendant No. 1 and his father were very near ralations of the plaintiff, the plaintiff in consultation with her husband agreed to come to an amicable settlement. Accordingly in June, 1931, an amicable settlement was arrived at between both parties to the effect that defendant No. 1 would give up 10 annas share of the properties left by Prasanna Kumar in favour of the plaintiff and her husband by a deed of release and in lieu thereof the plaintiff and her husband would give the defendant No. 1 some lands and some money in cash. In accordance with these terms the drafts of a Nadanpatra and a Kobala were made. The defendant No. 1, however, on the advice of his father subsequently broke his promise and sold the properties mentioned in the schedule of the plaint to defendants Nos. 2 to 5 by a Kobala on July 31, 1931.

Plaintiff came to know of this Kobala on 20th Sravan, 1338 B. S. (August 5, 1931) from her officer Ram Dulal Purkayestha and immediately on coming to know of the same performed Talabi Mahasibat according to the Muslim law of pre-emption and instructed her officer Ram Dulal to duly observe the requirements of Talabi Isad on her behalf on going without delay to the house of defendants Nos. 2 to 5 and on the lands sold. Accordingly,

the said officer without any delay went to the house of defendants Nos. 2 to 5 with witnesses and in their presence duly performed Talabi Isad on her behalf.

The Muslim law of pre-emption has been prevalent from time immemorial in the district of Sylhet amongst the Hindus and Muslims.

Even assuming that the defendant No 1 had any share in the plaint lands the plaintiff being a co-sharer in respect of the remaining share of the said lands she is entitled to claim the right of pre-emption.

The defendants in collusion with one another fraudulently stated Rs. 20,000 as the consideration money in the Kobala contrary to the real state of things. Plaintiff has come to learn on enquiry that the price was fixed only at Rs. 12,000 and that Rs. 500 only was paid by defendants Nos. 2 to 5 to defendant No. 1 on the date of the execution of the Kobala.

After selling the plaint lands to defendants Nos. 2 to 5 the defendant No. 1 was about to sell the other properties left by Prasanna Kumar. Considering that the plaintiff and her husband would be ruined by being involved in various sorts of litigations if strangers purchased the other properties plaintiff and her husband on the advice of their relations and well-wishers purchased all the other moveable and immoveable properties left by Prasanna Kumar excepting the plaint lands from the defendant No. 1 on fixing the price thereof at Rs. 23,000.

On these allegations plaintiff prays that a decree may be passed—

(a) for declaration of the plaintiff's title to the aforesaid 10 annas share of the lands etc. of the schedule obtained by her by virtue of inheritance from her father, the late Prasanna Kumar Choudhury and for confirmation of the plaintiff's possession therein;

(b) for a declaration that the defendant No. 1 is not the adopted son of the late Prasanna Kumar Choudhury and that the defendant No. 1 has no title or interest in the lands described below and that the defendants Nos. 2, 3, 4 and 5 have no title and right to possession in respect of the aforesaid lands;

(c) if, owing to the misfortune of the plaintiff, she is, for any reason, found, in the just decision of the Court, not entitled to the reliefs prayed for in items Nos. (a) and (b), above, then for declaration of the plaintiff's right of pre-emption in respect of the 10 annas share of the lands in claim and mentioned in the sche-

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dule below and for giving a decree to the plaintiff according to law, on directing payment by the plaintiff to the defendants Nos. 2, 3, 4 and 5 of the real consideration money of their purchase.

On November 28, 1932, defendants Nos. 2 to 5 filed their written statement stating *inter alia*

(1) The father and the mother of defendant No. 1 gave over defendant No. 1 to the hands of Prasanna Kumar and his wife Swarnamayee as adopted son. Prasanna Kumar took defendant No. 1 to his own house, brought him up as his own adopted son and made arrangements for his education and decided that the name of the boy should be Profulla Kumar Das.

(2) Plaintiff's husband being very much aggrieved on account of Prasanna's taking defendant No. 1 as an adopted son tried his best to prevent the performance of the necessary ceremonies.

(3) After the death of Prasanna Kumar Swarnamayee made arrangements for the performance of the ceremonies in accordance with the directions in the Will on a certain day. Mohendra however, did not allow the ceremony to take place on that date.

(4) In view of the directions in the Will of her husband Swarnamayee was firmly determined to perform the necessary ceremonies on a subsequent day and actually performed the necessary ceremonies, took the defendant No. 1 as the adopted son of her late husband and changed the name of the boy as settled by her husband.

(5) Defendant No. 1 thereafter came to be known to the public by his new name as an adopted son of Prasanna Kumar,

(6) After the death of Swarnamayee plaintiff and her husband began to ill-treat defendant No. 1. Thereupon defendant No. 1 had to leave Prasanna's house.

(7) After defendant No. 1 attained majority he asked Mohendra to deliver to him all his moveable and immoveable properties and render proper accounts of the period of his executorship. Mohendra, however, did nothing. The defendant No. 1 being helpless offered to sell the disputed property to defendants Nos. 2 to 5 for a consideration of Rs. 20,000. Defendants Nos. 2 to 5 accepted this offer and purchased the property for Rs. 20,000. Out of this consideration only Rs. 9,000 still remains unpaid.

(8) Plaintiff or her husband did not observe any of the formalities of pre-emption.

On January 16, 1933 defendant No. 1 filed his written statement. His defence in substance is the same as that of defendants Nos. 2

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to 5. He stated *inter alia* that after the death of Prasanna Swarnamayee on the strength of the permission given by Prasanna took him in adoption in the month of Chaitra, 1328, duly and according to the Shastras on performing the rites of Poshyajng, changed his former name into Profulla Kumar and since then he is known to the public as the adopted son of Prasanna Kumar. He also stated that defendants Nos. 2 to 5 paid him only Rs. 500 as the consideration of the Kobala executed by him on the date of the Kobala and that subsequently he was paid Rs. 2,500 only by the defendants Nos. 2 to 5. He further stated that if the plaintiff be found to be entitled to the relief of pre-emption he was entitled to get Rs. 17,000 (the balance of the consideration) out of the money to be paid by the plaintiff for pre-empting the disputed lands.

On these pleadings 14 issues were raised in the suit of which the following are only material for the purposes of this appeal:

(1) Is defendant No. 1 the validly adopted son of late Prasanna Kumar Choudhury ?

(2) Has the plaintiff observed the legal formalities as required by the law of pre-emption ?

(3) What was the consideration of the Kobala which the defendant No. 1 executed in favour of defendants Nos. 2 to 5 on July 31, 1931 ? What was the amount paid on the date of the execution of the Kobala by defendants Nos. 2 to 5 to defendant No. 1 ?

The Subordinate Judge has answered the first issue in the affirmative and the second issue in the negative. As regards issue No. 3 his finding is that although Rs. 20,000 was mentioned as the consideration of the Kobala only Rs. 12,000 was fixed as the actual consideration and that only Rs. 500 was paid by defendants Nos. 2 to 5 to defendant No. 1 on the date of the execution of the Kobala.

On these findings the Subordinate Judge has dismissed the suit.

Hence this appeal by the plaintiff.

The first point for determination in this appeal is whether defendant No. 1 was adopted by Swarnamayee on the 30th Chaitra, 1328 (April 13, 1922) on the authority given to her by her husband.

The finding of the Subordinate Judge that Swarnamayee performed the adoption ceremony on the 30th Chaitra, 1328 B. S.

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(April 13, 1922) is based mainly upon the evi dence of D. W. 2, D. W. 17, D. W. 11, D. W. 14 and D. W. 16

D. W. 2 is an old Muktear of good position. His evidence is that he was invited by Swarnamayee to the adoption ceremony but he could not attend. He is brother of the sister's husband of Sashi Babu (the father of defendant No. 1) and it is natural that he would be invited.

D. W. 17 is a retired Government officer. He also says that he got an invitation from Swarnamayee to the adoption ceremony but he did not attend the invitation. He is the maternal uncle of Sashi Babu. It is natural that he would be invited.

D. W. 11 is a Srotriya Brahmin and a Tarkanidhi. His evidence is that he was present at the adoption ceremony in the house of Ban Behari Goswami at Kurua and that Swarnamayee took defendant No. 1 in adoption after performing the necessary ceremonies. He is an independent witness.

The evidence of D. W. 14, is to the same effect. His evidence is that Swarnamayee took defendant No. 1 in adoption in the house of Ban Behari Goswami at Kurua and that the name of the boy was altered at the time of the ceremony. He is an independent witness and is a learned Pandit.

D. W. 16 an old pleader of the Sylhet Bar says that there was an adoption ceremony in the house of Ban Behari Goswami at Kurua ; that he met Swarnamayee at the ceremony and the father of defendant No. 1 gave defendant No. 1 in adoption to Swarnamayee. He is the brother of the father-in-law of Sashi Mohan, the father of defendant No. 1.

The Subordinate Judge who heard and saw these witnesses has believed their evidence.

In a case involving a question of fact the decision of which depends on the reliance to be placed on the testimony of witnesses the view of the Judges who tried the case and saw the witnesses is entitled to great weight.

The Advocate for the appellant asked us to disbelieve the evidence of these three witnesses on the following grounds :

(1) Plaintiff and three of her witnesses (P. W. 5, P. W. 7 and P. W. 12) have deposed that Swarnamayee expressed her willingness to adopt defendant No. 1 after the birth of the son of the plaintiff.

(2) It is improbable that Swarnamayee would not perform

the ceremony in her husband's house but in the house of Ban Behari at Kurua.

(3) There is no evidence that before July, 1931, when defendant No. 1 sold the disputed property to defendants Nos. 2 to 5, defendant No. 1 was known by the new name alleged to have been given to him at the time of his adoption.

(4) Thirteen witnesses examined by the plaintiff (P. W. 2, P. W. 4, P. W. 5, P. W. 6, P. W. 7, P. W. 9, P. W. 10, P. W. 12, P. W. 18, P. W. 20, P. W. 22, P. W. 24 and P. W. 26) have sworn that Swarnam ayee did not adopt defendant No. 1 as a son.

(5) The fact that Ban Behari in whose house the adoption is alleged to have taken place has not been examined indicates that the adoption ceremony was not performed in his house.

(6) The fact that Swarnamayee after the alleged adoption paid land revenue to Government in her own name (Ex. 13 to 13-E) and the fact that she gave lease (Ex. 9) on January 25, 1923 of some lands left by Prasanna as Malik indicate that there was no adoption of defendant No. 1 by her.

(7) Defendant No. 1 did not perform the Sradh ceremony of Swarnamayee and the annual Sradh.

First ground :

In paragraph 4 of the plaint plaintiff stated :

"Swarnamayee Choudhurani had never any intention of taking the defendant No. 1 in adoption and *immediately after her husband's death she gave out that she would not take the defendant No. 1 in adoption*, and she died without taking the defendant No. 1 in adoption. Besides, *only a short time after her husband's death, she sent away the defendant No. 1 to his father's house.* The defendant No. 1 on going there continued to live with his father as before and is likewise living in the same mess with him even now."

In her evidence, however, plaintiff said :

"After the birth of my eldest son Kali Prosad (on November 12, 1920) my mother sent away Aswini to his house because he came for studies but did not prosecute studies and my mother said " I have got a grandson (daughter's son), I shall not take him in adoption. Let him go away to his house."

There cannot be any doubt that there is substantial variance between her pleading and her evidence on this point.

The reason for this variance appears to me to be this :

After defendant No. 1 was brought by Prasanna to his house for being adopted as a son he was admitted into Rajpur School

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on June 23, 1919 (Ex. 1-A) and was attending that school from Prasanna's house. Ex. 1-B, the admission register of Mongalchandi M. E. School shows that he was reading in Rajpur School up to 28th January, 1922. Prasanna died on September 3, 1919. In view of this evidence it was impossible for the plaintiff to maintain the position that Swarnamayee sent away the defendant No. 1 to his father's house a short time after her husband's death. She therefore had to change her case made in the plaint.

The case made by her in her evidence that Swarnamayee expressed her unwillingness to adopt defendant No. 1 after the birth of her grandson is not to be found anywnere in the plaint. It is, therefore, a new case. Her evidence does not show how long after the birth of her son defendant No. 1 was sent away from Prasanna's house.

P. W. 5 says that he is one of the family priests of the plaintiff. In his evidence he said :

"Swarnamayee did not adopt a son as a son was born to her daughter............After the death of Prasanna Swarnamayee did not want to perform any ceremony...........In 1327 (the last date of this Bengali year corresponds to April 13, 1921) Aswini (defendant No. 1) left the house of Prasanna."

I do not believe the evidence of this witness as there cannot be any doubt that defendant No. 1 did not leave the house before 28th January, 1922.

P. W. 7 in his evidence stated :

"He (defendant No. 1) was in Prasanna Babu's house for about a year after his death. Swarnamayee did not adopt Aswini. Plaintiff's eldest son Kalika Prasad was born in 1327 B. S............ Aswini was in the house of Prasanna at the time of the birth of Kalika Prasad. Aswini left the house after that as Swarnamayee did not adopt him............He left the house of Prasanna Babu 5 or 6 months after the birth of Kalika Prasad. I never heard that Prasanna Babu had or will adopt Aswini. Swarnamayee expressed her willingness to adopt Aswini—probably hearing that Aswini left Prasanna Babu's house. She told me one day that she will not adopt. She said that 4 or 5 months after the birth of Kalika Prasad. I had come there and she told me some females of the family were present there at the time. I went there on no particular business. I did not meet Aswini after that.........Aswini sold to Rajnandini (plaintiff) and Mohendra for Rs. 23,000. I am a witness to that Kobala (Ex. 3). Iswar Chandra Dutta read it out. I was called to the Kobala Majlish after the document

had been written out. I don't know any man of the name of Profulla Kumar Das Choudhury. I never knew any man of that name. Aswini wanted to sign his name as Profulla Das Choudhury —Mohendra Babu objected Aswini would not listen to it and then Mohendra Babu agreed to it and told us that he might sign as Profulla Das Choudhury—he is interested in it and we should not object. This discussion took place when Aswini was going to sign. The documents were not written in my presence, they were only signed and attested in my presence."

This witness says that he is a family priest. But on the day Swarnamayee is alleged to have told him that she would not adopt a son he did not go there on any particular business. His evidence that defendant No. 1 left Prasanna's house five or six months after the birth of plaintiff's son, i.e., in April or May, 1921 is not true as the documentary evidence in this case shows that defendant No. 1 was in the house of Prasanna Kumar at least up to the end of January, 1922. He admits that defendant No. 1 sold to the plaintiff and her husband some properties left by Prasanna for Rs. 23,000 by a Kobala and that he attested this document. He was not present when the document was written out. The Kobala was read out before defendant No. 1 executed it and he attested it. In the beginning of the Kobala it is stated that the name of defendant No. 1 is Profulla Kumar and that he is the son of Prasanna Kumar. His evidence is that he never knew any man of the name of Profulla Kumar. But he was not surprised when the description of the vendor was read out in his presence. His story is that plaintiff's husband objected to defendant No. 1's signing as Profulla Kumar. This is improbable as the whole Kobala had already been written out with the knowledge and consent of plaintiff's husband. The Subordinate Judge has disbelieved the evidence of this witness and I see no reason to believe him.

P. W. 12 in his evidence stated:

"Swarnamayee, as far as I recollect, lived in my house in Sylhet when she came in connection with the Probate. Mohendra had brought her and he also had put up with me. If I remember aright then Swarnamayee swore the affidavit in the house of Bepin Babu pleader (Mohendra's first cousin—Mashtuto)...........I had talks with Swarnamayee on various subjects" and she said—"Now that a son has been born to my daughter what would I do by adopting a son."

This witness is a pleader of Sylhet Court. He is a cousin of plaintiff's husband. Plaintiff's husband puts up with him whenever

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he comes to Sylhet. The date of the affidavit which is alleged to have been sworn by Swarnamayee at Sylhet is not known as the affidavit has not been produced. This witness saw Swarnamayee only twice during her widowhood, once in his house in Sylhet (1920-1921) and once in her house when she had become insane. When did he see Swarnamayee for the second time? This must be after the probate case. According to the evidence of this witness defendant No. 1 was 13 or 14 years old when he saw him in Prasanna's house. Therefore he must have seen Swarnamayee for the second occasion in his house in 1928 or 1929. This witness further says that Swarnamayee was a widow for 7 or 8 years. But admittedly Swarnamayee died in September, 1924 This witness also says that he had talks with Swarnamayee on various subjects. He does not say what those subjects were. It is not clear why Swarnamayee would tell him in the course of conversation that she would not adopt a son as a son had been born to her daughter. Although this witness says that he never treated defendant No. 1 as the adopted son of Prasanna he advised plaintiff's husband to pay something to defendant No. 1 and plaintiff and her husband paid Rs. 23,000 to defendant No. 1 for purchasing some of the properties left by Prasanna from defendant No. 1.

Plaintiff was only 19 years old when Prasanna made up his mind to adopt a son. It cannot be said, therefore, that at the time he gave up the hope of the birth of a son to his daughter. His direction in the Will was that his wife should give effect to his last wishes. Why would Swarnamayee, a Hindu widow, disregard the last wishes of her husband simply because a son was born to her daughter?

The plaintiff, in my opinion, has failed to show that Swarnamayee gave up the idea of adopting defendant No. 1 after the birth of the plaintiff's son.

Second ground:

The case of the defendant is that Swarnamayee performed the adoption ceremony at Kurua as she made an attempt to perform this ceremony in her husband's house on the 29th of Magh, 1328 (February 12, 1922) but could not succeed on account of the obstacle put in her way by the plaintiff and her husband.

D. W. 14 in his evidence says that about 14 years ago he went to the house of Prasanna in connection with the adoption ceremony as he was invited. He also says that he reached the place on the previous night but the next morning the boy who was to be

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adopted was missing. He is a learned Brahmin Pandit of the Srotriyas.

Although defendant No. 1 was transferred to Mongalchandi M. E. School it appears from Exts. 2 to 2 (N) that he was absent from that school during the month of February, 1922. This fact shows that something must have happened during this month to him. There is no explanation about his absence from school in this month. The Subordinate Judge has believed the evidence of D. W. 14 and there is no reason why I should disbelieve him.

Third ground :

The case of the defendants is that after the adoption the name of the defendant No. 1 was changed from Aswini Kumar to Profulla Kumar. The evidence of D. W. 14 is that the name of defendant No. 1 was altered at the time of the adoption ceremony.

The adoption ceremony according to the defendants took place on April 13, 1922. On May 1, 1922 following notice (Ex. G) was published in the 'Sylhet Chronicle' :

"I have taken probate of the last testament of my husband. And in exercise of the power and authority given to me by my husband under the Will, relating to the said probate, I have taken Sriman Aswini Kumar Das, son of Sashi Nath Choudhury, of Pargana Dulati as adopted son by duly performing the Poshyajaq (rites of adoption) on the 30th Chaitra 1328 B. S., at the place of my spiritual preceptor in the house of Srijukta Ban Behari Goswami, in Mouja Nij Kurua, Pargana Kurua. In the Poshyajag (rites of adoption) the other name of the said Sriman Aswini Kumar has been fixed to be Sriman Profulla Kumar Choudhury, and he has become the absolute owner of the properties left by my husband, the late Prasanna Kumar Choudhury on and from the said 30th Chaitra, according to his Will.

Swarnamayee Choudhurani of Ilaspur,
Pargana Boaljur, Station
Balaganj, District Sylhet."

The contention of the plaintiff is that there is no satisfactory evidence to show that Swarnamayee had this notice published and that the notice must have been published by the father of defendant No. 1 to create evidence of adoption.

This argument proceeds on the assumption that the evidence of D. W. 14 is false

The father of the defendant No. 1 in his evidence stated that Swarnamayee gave the notice to him to be published. In his examination-in-chief he also stated that Swarnamayee signed the

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original notice but in his cross-examination he stated that he did not recollect whether she signed the original draft or the copy. He also stated that Swarnamayee might have signed in his presence.

The notice that was sent to the press is not available now.

It is an admitted fact that Swarnamayee could sign her name. The name of Swarnamayee at the foot of the notice published does not show that her name was not signed by any body else. Did the father of defendant No. 1 forge this signature ?

Sylhet Chronicle is a local newspaper. It is supplied to the Bar Library of Sylhet. The cousin of the plaintiff (P. W. 12) in whose house the plaintiff used to stay whenever he came to Sylhet is a member of the Sylhet Bar. If the father of defendant No. 1 wanted to publish a notice containing false statements with a forged signature would he venture to do so in a local newspaper and would take a risk of being detected and contradicted. On the other hand in view of the attitude of the plaintiff and her husband the publication of such a notice would be prudent.

It is true that the name of the defendant No. 1 was not changed in the school register. But the change has already been published in newspaper. If the father of defendant No. 1 was creating false evidence he would get the name changed also in the school register. The omission to get the name changed in the school register is, therefore, not of much importance.

I, therefore, see no reason to disbelieve the evidence of D. W. 14 that the name of defendant No. 1 was changed at the time of the adoption ceremony.

Fourth ground :

The learned Subordinate Judge after considering the evidence of the thirteen witnesses on which plaintiff relies to substantiate this ground has observed :

"The negative testimony of these witnesses carry no conviction. Besides, most of the witnesses are highly interested persons some of them are creatures of the plaintiff and her husband and no reliance can be placed upon their testimony. Plaintiff's family admittedly is the most influential in the locality and so it was not difficult to produce negative evidence of the nature she has done."

Where the only question is which set of witnesses is to be believed the findings of the trial Judge should not be lightly regarded on a mere calculation of probabilities by the Court of appeal.

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These thirteen witnesses may be classified under two heads:

(a) Kurua witnesses: (P. W. 6 and P. W. 26)

(b) Witnesses from other villages.

The evidence of P. W. 6 is that Swarnamayee did not perform the adoption ceremony in the house of Ban Behari Goswami at Kurua. The reason apparently for this statement is that he would have known of such ceremony if such a ceremony had actually taken place. He also says that Ban Behari's house is 4 or 5 houses away from his house. He, however, admits that there are two Samajes in Kurua. He also admits that his Samaj is different from the Samaj of plaintiff's husband and the Samaj of Kamini Babu, father-in-law of Sashi Babu (the father of defendant No. 1). He further says that the Goswamis are outside the Samaj of Kayesthas. He is a brother of the sister's husband of Ramdulal, the Naib of the plaintiff.

D. W. 26 says that Swarnamayee did not adopt a son in the house of Ban Behari Goswami in Chaitra, 1328. He also says that only one house intervenes between his house and the house of Ban Behari. In his cross-examination, however, he admitted that after the death of his son in Agrahayan, 1328, he did not leave his house and that he was ill throughout the year 1328 up to the month of Chaitra of that year.

The evidence of these two witnesses, in my opinion, does not disprove the evidence of D. W. 11. D. W. 14 and D. W. 16.

The remaining eleven witnesses who come from villages other than Kurua may be sub-divided under the following heads:

(i) relations of Prasanna Kumar (P. W. 24 and P. W. 4)

(ii) relation of plaintiff's husband (P. W. 12)

(iii) servants of the plaintiff (P. W. 20 and P. W. 10)

(iv) tenant of the plaintiff (P. W. 2);

(v) family priests of the plaintiff (P. W. 7 and P. W. 5)

(vi) other persons (P. W. 9, P. W. 22 and P. W. 18)

P. W. 24 is an agnate of Prasanna. His evidence is that defendant No. 1 was not adopted by Swarnamayee. The suggestion against this witness by the defendants is that he is a debtor of the plaintiff's husband. He, however, denied this though at the same time he admitted that he had debts. When he was asked about the amount of his debts he said that he did not know but that his son knew about them.

P. W. 4 is the son of the brother of Prasanna Kumar's mother. His house is more than 30 miles from Prasanna's house and he admits that he is not on visiting terms with Prasanna's family.

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P. W. 12 is a cousin of plaintiff's husband. He is pleader of Sylhet Bar. His evidence is that he does not know that Swarnamayee adopted defendant No. 1. This witness, however, advised plaintiff's husband to purchase peace by paying defendant No. 1 something.

P. W. 20 is the Naib of the plaintiff. His evidence is that Swarnamayee did not adopt defendant No. 1 at the house of Ban Behari Goswami at Kurua.

P. W. 10 is a Mondal of the plaintiff and her husband. He is a Muslim. His evidence is that Swarnamayee did not perform the adoption ceremony at Kurua.

P. W. 2 is a non-kar tenant of the plaintiff. His evidence is that defendant No. 1 was never adopted as a son by Swarnamayee.

The evidence of P. W. 7 is that Swarnamayee did not adopt Aswini. This witness in his evidence stated that defendant No. 1 left the house of Prasanna about a year after his death. This statement is admittedly not true. He is an attesting witness to the document (Ex. 3) in which defendant No. 1 was described as the son of Prasanna.

The evidence of D. W. 5 is that Swarnamayee did not adopt any son. The reason for his saying so is that he would have been invited if there had been any such adoption by her.

P. W. 8 is a Kaviraj. His evidence is that Swarnamayee did not adopt any son. The basis of this statement is that he never got any invitation to adoption by Swarnamayee.

P. W. 22 is a Mirasdar. His evidence is that he does not know of any adoption by Swarnamayee. In his cross-examination, however, he admitted that he had never been to the house of Prasanna Babu on business.

P. W. 18 is a Zemindar. His evidence is that before the last five or six years he never heard that Prasanna's widow had adopted a son. He is a creditor of plaintiff's husband.

This is the nature of evidence of the witnesses on which the plaintiff relies in support of the fourth ground. This evidence, in my opinion, is not sufficient to discredit the positive testimony of D. W. 11, D. W. 14 and D. W. 16.

Fifth ground:

The evidence of D. W. 15, father of defendant No. 1 is that he tried to procure Ban Behari but he, being influenced by the plaintiff refused to come. Ban Behari is admittedly the Guru of plaintiff's family and plaintiff's family is the most influential in the

locality. The learned Subordinate Judge has observed : "Probably she has also been successful in preventing witnesses from coming on the side of the defendants who would have otherwise come." This observation is justified by the facts and circumstances disclosed in the case.

Sixth ground :

The payment of land revenue or the granting of lease by Swarnamayee is not inconsistent with the adoption of defendant No. 1 inasmuch as by clause 6 of Prasanna Kumar's Will she was to be the executrix of the ten annas share of the properties jointly with her son-in-law till defendant No. 1 would complete the age of 22 years.

Seventh ground :

The evidence of D. W. 1 and his father is that defendant No. 1 performed the Sradh ceremony of Swarnamayee and that he performed the first annual Sradh. We are asked to reject this evidence as defendant No. 1 could not name the Gotra. But defendant No. 1 was a mere boy at the time when the Sradhs were performed. I am not, therefore, prepared to disbelieve this evidence on this ground.

The grounds relied on by the plaintiff to show that the evidence of D. W. 11, D. W. 14 and D. W. 16 is false do not, in my opinion, disprove the truth of their sworn testimony. I see no reason to disbelieve them. Further, the plaintiff and her husband paid Rs. 23,000 to the defendant No. 1 in satisfaction of the claim of defendant No. 1 in respect of the 10 annas share of properties of Prasanna Kumar excepting the disputed properties. If really the claim of defendant No. 1 that he was adopted by Swarnamayee was false, why was he paid such a big sum of money ?

In view of all these facts and circumstances I agree with the Subordinate Judge that defendant No. 1 was adopted as a son by Swarnamayee.

The next point for determination is whether the adoption of defendant No. 1 is valid according to Hindu Law.

The contention of the plaintiff is that Prasanna Kumar was a Sudra and defendant No. 1 is a Vaishya and consequently the adoption of defendant No. 1 by Swarnamayee as a son of Prasanna Kumar is invalid according to Hindu law.

Prasanna Kumar was admittedly a Kayestha and, therefore a Sudra.

There is no allegation in the plaint that defendant No. 1 is a Vaishya. There is no evidence also in this case to show that the

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natural father of defendant No. 1 is a Vaishya or claims to be a Vaishya.

The contention of the plaintiff, however, is this: all Vaidyas are Vaishyas. The natural father of defendant No. 1 is a Vaidya, defendant No. 1 is therefore a Vaishya.

In support of this contention reliance was placed upon a passage in the judgment in *Ram Lal Shookool and others* v. *Akhoy Charan Mitter* (1). In that case a question arose as to whether a marriage between a Vaidya and a Kayestha was valid. In that case a Kayestha woman married a Baidya. The Subordinate Judge who tried that case quoted the following text from "Vishnu"*

"That the Vaidyas in ancient times were like their fathers in spiritual energy by meditations and Yoga (communion). They were inferior to Brahmins and Kshatrias and carried on work (Vedic ceremonial) like the Vaishyas. By gradual and gradual neglect of the work a Vaidya has become degenerated in the Kali Yuga wholly with a Sudra just as the Kshatrias and Vaishyas."

We have not been able to trace this text.

When the matter came up in appeal in this Court, this Court observed :†

"In regard to the title of Chandra Kanta Sen, it cannot be disputed that his mother a Kayestha and therefore a Sudra married his father a Vaishya. The ancient Hindu law did not regard such marriages with the condemnation expressed by later authorities which have been accepted by our Courts so as to make children born from such unequal marriages illegitimate."

"But however the law may be, there is ample evidence set out in the judgment of the Sub-Judge on which it must be held that such marriages as in the present case are recognised by local custom in the District of Tipperah and that there is no instance on which their validity has been questioned."

The learned Judges in that case did not discuss the question whether a Vaidya is a Vaisya. They assumed in that case that a Vaidya was a Vaishya and held that a marriage between a Vaidya and a Vaishya was valid under the local custom in *Tipperah*. This case is no authority for the proposition that a Vaidya of Sylhet District is also a Vaishya. Further, in the absence of any evidence this case does not establish that the natural father of defendant No. 1 is a Vaishya.

(1) (1903) 7 C. W. N. 619.
*See p. 625—Rep.
†See p. 633—Rep.

The surname of a Vaidya is 'Dhana' (Sankha Sanghita—Ch. 2, V. 4)—or Gupta (Cullaka's Commentary on Manu). But the natural father of defendant No. 1 is neither a 'Dhana' nor a Gupta (sometimes he has used after his name Das Gupta).

Originally there were four pure castes amongst the Hindus—Brahman, Kshatriya, Vaisya and Sudra. Later on inter-marriages having taken place amongst the four primitive or pure castes there became several mixed castes.

"The sons by women one degree lower than their husbands, are named *in order* the Murddhabishikta, Mahishya and Karana. They are respectively begotten by a Brahman on a wife of the Kshatriya caste, by a Kshatriya on a Vaishya wife, and by a Vaishya on a Sudra wife" (Vide Culluka Bhatta's Commentary on Manu, Ch. 10, V. 8).

"The sons born of women two or three degrees lower than their husbands are as follows: 'From a Brahman on a wife of the Vaishya class, is born a son called *Ambashtha*, on a Sudra wife, a Nishada, named also Parasare;"—Manu Ch. 10, V. 8.

Plaintiff's contention is that a Vaidya is an 'Ambashtha', that as his mother is a Vaishya he is a Vaishya and that he cannot be adopted by a Sudra.

The contention raises three questions:—

(1) whether a Vaidya is an 'Ambashtha';

(2) whether an 'Ambashtha' is a Vaishya; and

(3) what is the rule of Hindu Law as regards the adoption of an Ambashtha.

Babu Shyama Charan Bidyabhusan while quoting Manu Ch. 10, V. 8, in Chapter on 'Castes and Classes of the Hindus' in his Vyavastha Darpan has added the words "or Vaidya" after the word "Ambashtha."

Risley in his book on the 'Tribes and Castes of Bengal' has stated:

"The name Vaidya does not occur in Manu but the Ambasthas are there said to be the offspring of a Brahman father and a Vaishya mother, and their profession to be the practice of medicine. According to this account the Vaidya's are *anulomaj* (born with the hair or grain i. e., in due order), the father being of higher caste than the mother. Another tradition describes them as begotten on a Brahman woman by one of the Aswini Kumars, the light-bringing and healing twin horse-men of Vedic mythology; and then, oddly enough, goes on to say that they were reckoned as Sudras because their mother was of superior rank to their father,

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and their generation was consequently *pratilomaja*, 'against the hair' or in the inverse order according to the succession of the castes. It would appear from this that the Aswini Kumars were classed as Kshatriyas, and that, according to Brahmanical ideas, even the gods were not equal mates for a Brahman maiden.

"An expanded version of the pedigree given by Manu is found in the Skanda Purana. This legend tells how Galava Muni, a pupil or son of Viswamitra, being greatly distressed by thirst while on a pilgrimage, was given a draught of water by a Vaishya girl named Birbhadra. The grateful sage blessed the maiden that she should soon have a son. Birbhadra demurred to this boon, on the ground that she was unmarried ; but the rash oath, so characteristic of Indian mythology, could not be recalled, nor could Galava himself put matters straight by marrying the virgin whose kindness had involved her in so strange a difficulty. For, so it is explained, she had saved his life by the draught of water, and therefore he looked upon her in the light of a mother. A miracle was clearly in request. By the power of word of a Vedic Mantra a wisp of Kusa grass (Poa Cynosuroides) was transformed into a male child, variously known as Dhanvantari, Amrita Acharya, and Ambastha. He was the first of the Vaidyas, because he had no father, and therefore belonged to the family of his mother (Amba). A number of analogous myths have been collected by Bachofen in his two letters on "Pueri Juncini", and his method of interpretation, if applied to the present case, would lead to the conclusion that the tradition given in the Skanda Purana records an instance of female kinship" (See Volume I, pp. 46-47).

Babu Golap Chandra Sarkar in his treatise on Hindu Law (7th Edition, p. 149) has observed :

"The explanation of the mixed classes by supposing them to be the issue of inter-marriage appears to be a play of imagination ; where the abstract qualities of any two of the four tribes, were thought requisite for filling a particular occupation, persons following that occupation were supposed to be descended from the offspring of an inter-marriage or illicit connection between a man of one tribe and a woman of the other. Thus the Ambasthas or the members of the physician caste of Bengal are imagined to be a mixed caste sprung from the issue of a Brahman father and a Vaishya mother : a physician resembles a Brahman in his general culture and learning, and also a Vaishya, inasmuch as he does, in a manner, trade with his learning, and so the class is fancied to be mixed of the said two tribes, the worse quality being supposed to be

derived from the mother and the father from the father. The number of castes appears to have increased with the increase of occupations, in the course of progress ; for, later writers enumerate many that are not mentioned in the earlier works, and they describe the origin of the new castes according to their fancy."

No other authority was placed before us to show the origin of Vaidyas.

This being the position it is very difficult to say that Vaidyas are Ambashthas as mentioned in Manu's text quoted above.

No authority was cited before us in support of the view that an Ambashtha is a Vaisya.

Assuming that Vaidya is an Ambashtha what is the rule of Hindu Law relating to his adoption ?

"He is called a son given whom his father or mother affectionately gives as a son being *alike* etc."—Manu 9-168.

The word '*alike*' in Manu's text according to Medhatithi means "alike by qualities suitable to the family."

This interpretation, however, has not been accepted in Dattaka Chandrika and Dattaka Mimangsha. In these two books the word has been interpreted as "alike by tribe."

"The adoption of a son by any Brahmin must be made from amongst Sapindas or kinsmen connected by an oblation of food or on failure of these an A sapinda or one not so connected otherwise let him not adopt. Of Kshatriyas *in their own class* positively... of Vaishyas from amongst those of the Vaishya class, of Sudras from amongst those of the Sudra class ; of all and the tribes likewise (in their own) classes only and *not otherwise*."—Saunaka.

By the terms 'Kshatriya and the rest' in the above text of Saunaka the inclusion of Murddhabishikta and others regulated by the same rule as the Kshatriya and the rest is meant : for a text of Sankha expressed : "One procreated on a female Kshatriya by a Brahmin is a Kshatriya even : on a Vaisya woman by a Kshatriya is a Vaisya ; by a Vaisya on a female Sudra is even a Sudra."—(Dattaka Mimangsha. section 2, clause 84.)

An Ambashtha, therefore, does not come under "Murddhabishikta and others" mentioned in section 2, clause 84 of the DattakaMimangsha.

The rule of prohibition contained in Manu's text and Saunaka's text quoted above does not, therefore, apply to an 'Ambashtha.'

The rule laid down in Saunaka applies to a Sudra and therefore to a Kayestha.

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Shyama Charan Sarkar Bidyabhusan after reviewing the authorities has observed :

"There is, therefore, a preponderance of authority to evince that the Kayasthas whether of Bengal or of any other country were Kshatriyas. But since several centuries passed the Kayesthas (at least those of Bengal) have been degenerated and degraded to Sudradom not only by using after their proper names the surname 'Das' peculiar to the Sudras giving up their own which is 'Barma', but principally by omitting to perform the regenerating ceremony Upanayana hallowed by the Gayatri,"—(see 3nd Edition of Vyvastha Darpan p. 670.)

Here apparently the learned author was referring to verse 4, ch. 2 of Sankha Sanghita where it is stated that Sudra is called 'Das' and a Kshatriya is called 'Barma.'

"The Vaidyas are now divided into the following four sub-castes :- (1) Rarhi, (2) Banga, (3) Barendra (4) Panchakati, according to the parts of Bengal in which their ancestors resided. All of these are endogamous. A fifth endogamous group which, however, bears no distinctive name, comprises those Vaidya families of the districts of Sylhet, Chittagong and Tipperah who inter-maary with Kayestha and Sunris, the children in each case following the caste of the father. This practice appears to be the only modern instance of inter-marriage between members of different castes. It is said to have arisen from the reluctance of the Vaidyas farther west to give their daughters to men who had settled in the country east of the Brahmaputra. Failing woman of their own caste, the latter were compelled not only to marry the daughters of Kayesthas, but to give their own daughters in return.................The evidence of inscriptions shows that a dynasty of Vaidya kings ruled over at least a portion of Bengal from 1010 to 1200 A. D. To the most famous of these, Ballal Sen, is ascribed the separation of the Vaidyas into two divisions, one of which wore the sacred thread and observed fifteen days as the prescribed period of mourning, while with the other investiture with the thread was optional and mourning lasted for a month...........There has been some controversy between Vaidyas and Kayesthas regarding their relative rank.........Putting aside the manifest futility of the discussion, we may fairly sum it up by saying that in point of general culture there is probably little to choose between the two castes, and that the Vaidyas have distinctly the best of the technical claim to precedence. On the other hand, it would, I think, strike most observers that the Kayesthas are the more pliant and adaptive of the two, and have thereby

drawn to themselves a larger share of official preferment than the more conservative Vaidyas"—(Risley—Volume I, pp. 47 to 50.)

Swarnamayee, the sister of the father of defendant No. 1, was married to Prasanna Kumar who was admittedly a Kayestha and, therefore a Sudra. This marriage admittedly is valid according to local custom.

Saunaka, while propounding the form of the adoption says :

"Having taken him by both hands .... the boy bearing *the reflection of a son.*"

The words '*reflection of a son*' in the above text of Saunaka have been interpreted in Dattaka Chandrika (Section 2, Clause 8) as the 'resemblance of a son' or in other words '*the capability to have been begotten by the adopter through appointment and so forth*'.

The words "so forth" include marriage.—[*Haridas Chatterjee* v. *Monmotho Nath Mullick* (1)].

Defendant No. 1 could have been legally begotten by Prasanna through marriage with the mother of defendant No. 1, as such marriage would have been val id and legal.

In clause 3 of the Will of Prasanna Kumar defendant No. 1 is described as 'Aswini Kumar Das'. The declaration (Ex. Q) which was made by the father of defendant No. 1 at the time of the adoption, shows that he is a 'Das' and his wife a 'Dassi'. The father of defend ant No. 1 signed the declaration as "Sashi Mohan Das". In the notice (Ex. G) which was published in the Sylhet Chronicle the name of defendant No. 1 was given as 'Aswini Kumar Das'. There cannot be any doubt, therefore, that the father of defendant No. 1 uses the surname 'Das' after his name (though he sometimes adds Gupta after Das). There is no evidence in this case that *Upanayana* ceremony (investiture with sacred thread) which regenerates Brahmans, Kshatriyas and Vaisyas and without which they become degraded, with *Gayatri* (a sacred verse which is considered to be the essence of the Vedas which is imparted or taught to every youth of the three superior classes upon receiving his investiture with the sacred thread) is performed in the family of the natural father of defendant No. 1. There is also no evidence that the period of mourning in Sashi Mohan's family lasts for fifteen *days.*

In view of these facts and circumstances I am of opinion that even if the ancestors of Sashi Mohan were Ambashthas or Vaisyas

(1) (1937) 41 C. W. N. 322 (330).

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his family has been degenerated and degraded to *Sudradom* and that he is a *Sudra*.

I, therefore, hold that the adoption of defendant No. 1 by Swarnamayee was valid according to Hindu Law.

It was contended on behalf of the defendants that by clause (4) of Prasanna's Will defendant No. 1 became entitled to ten annas share of his property as soon as the adoption ceremony was performed by Swarnamayee irrespective of the question whether the adoption is valid in law or not. There is much force in this contention. But as I have found that the adoption of defendant No. 1 is valid in law it is not necessary to express any opinion on this point.

The last point for determination in this appeal is whether the plaintiff is entitled to pre-empt the disputed propeities from defendants Nos. 2 to 5.

By custom the Hindus of the district of Sylhet are entitled to the benefit of the Muslim Law of pre-emption.

In order to entitle the plaintiff to a decree for pre-emption she has to prove that she made two Talabs—Talab-i-Mawasibat (hereinafter referred to as the 'first demand') and Talabi-i-Isad (hereinafter referred to as the 'second demand')—in accordance with the Muslim Law of Pre-emption.

The plaintiff's evidence on this point is this: P. W. 20 informed her on 20th Sravan, 1338 (August 5, 1931) of the sale of the disputed property by defendant No. 1 to defendants Nos, 2 to 5. On receipt of this information she stood up and made the 'first demand' in the presence of P. W. 20 and P. W. 19 by these words: "I am Safi, I am Safi, I am Safi. I claim the right of pre-emption, I claim the right of pre-emption, I claim the right of pre-emption. I make the claim of pre-emption with regard to that property of mine which Sobhandi's sons and nephew have purchased. I make the claim of pre-emption, I make the claim of pre-emption. Whatever price they have paid for the said lands, I want to keep the said lands on paying the same amount as price, I want to keep the said lands on paying the same amount as price." Then she said to P. W. 20, "You go as early as possible with witnesses to the house of Sobhandi (father of defendants Nos. 2 to 4) and on declaring in the presence of the purchasers that have performed the first formalities of pre-emption you duly perform the second formalities of per-emption within the lands sold and come back, I empower you to do that." P. W. 20 then left her house. At the time when she got the information of the sale her husband was at Sylhet

and she sent P. W. 27 to Sylhet to inform her husband of this sale. P. W. 20 returned that very day and said "I have come after duly performing the formalities of the second rule."

The two witnesses to the first demand, therefore, according to the plaintiff, are P. W. 20 and P. W. 19. P. W. 20 is the Naib of the plaintiff and is looking after this case on her behalf. P. W. 19 is a servant of the plaintiff. P. W. 20 says that on receipt of the information of the sale from him plaintiff stood up and made the first demand. He repeated the exact words which are alleged by the plaintiff to have been used by her. P. W. 19 says that he heard about the sale from D. W. 23 and informed P. W. 20 about it. D. W. 23, however, says that he did not inform P. W. 19 about the sale. P. W. 19 says that on hearing the information plaintiff made the first demand. He also repeated the identical words alleged by the plaintiff to have been used by her.

P. W. 20 in his evidence says that he went to Sobhandi's house and made the second demand by the following words in the presence of P. W. 19, P. W. 15, P. W. 24 and defendants Nos. 2 to 5 :—

"The lands of Taluk No. 2 Sundar Roy and others, to the south of the river which Aswini, son of Sashi Choudhuri of Lal Kailash, Pergana Dulati, has sold to you, in those lands Rajnandini is a Safi. As soon as she heard of the sale she performed the first ceremony of pre-emption and has claimed pre-emption. She hae given me the authority to perform the second ceremony. I claim the right of pre-emption on her behalf and as her agent. The amount for which you have purchased the lands, Rajnandini is ready to pay that amount. Be ye .... all witnesses to it."

P. W. 19, P. W. 15 and P. W. 24 in their evidence say that P. W. 20 made the second demand in their presence and they repeat the exact words alleged to have been used by P. W. 20 while making the second demand.

The Subordinate Judge has disbelieved the evidence of the plaintiff and of the witnesses who are alleged to have been present at the time of the two demands.

In June, 1931, plaintiff and her husband had been negotiating with defendant No. 1 for taking a deed of release from him in respect of the entire 10 annas share claimed by defendant No. 1 on payment of Rs. 15,000 and the sale of some lands in Dulati belonging to plaintiff's husband. The drafts were being prepared on the footing that defendant No. 1 was not the adopted son of her

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father. It was at this time that she is alleged to have received from P. W. 20 the information of the sale by defendant No. 1 to defendants Nos. 2 to 5. She did not know the price paid by defendant No. 1 to defendants Nos. 2 to 5. Her husband was not at home. Can it be believed that without consulting her husband she at once decided to purchase only the disputed property from defendants Nos. 2 to 5 and thereby to jeopardize her interest in the other properties left by Prasanna by admitting the defendant No. 1 as a co-sharer?

Plaintiff in her evidence says that before the sale of the disputed property by defendant No. 1 to defendants Nos. 2 to 5 one of her cousins was bent upon selling to a stranger his share in some property of which she was a co-sharer with him and that at that time she asked her husband what would be her remedy if the said cousin would sell away the property to a stranger. She also says that her husband then gave her instructions as to the law of pre-emption. She could not, however, say what property her cousin was going to sell away. Her husband gave his evidence in this case. In his evidence he does not say that he told the plaintiff how the two demands were to be made. Again, plaintiff's case is that her husband told her about the law of pre-emption three or four years before the suit, i. e. in 1928 or 1929. Can it be believed that she remembered in 1931 the details of the two demands which she is alleged to have learnt from her husband?

Plaintiff gave her evidence in 1934, i. e. three years later. It is curious that she remembered the exact words which she used when she made the first demand and the exact words which she asked witness No. 20 to use while making the second demand on her behalf. P. W. 20 and the witnesses to the second demand gave their evidence in 1936, i. e., 5 years later. P. W. 20 remembers the exact words which he used while he made the second demand. The witnesses to the second demand repeat the same words which P. W. 20 is alleged to have used when he made the second demand. P. W. 24 is an agnate of the plaintiff. He is not on good terms with defendants Nos. 2 to 5. P. W. 15 is no doubt not related in any away to the plaintiff, but this witness remembers the exact words which P. W. 20 is alleged to have used while making the second demand. The evidence of P. W. 12 and P. W. 13 is not of much assistance to the plaintiff. The defendants Nos. 2 to 5 deny that the demands were made as alleged by the plaintiff's witnesses. Under the circumstances I am not prepared to hold that the Subordinate Judge was wrong in holding that the plaintiff

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"FORM" & "SUBSTANCE" OF TRANSACTIONS IN INCOME-TAX LAW

BY

Mr. Balai Lal Pal, M.A. B.L., Advocate, High Court, Calcutta.

In *the Eccentric Club Ltd.* case (1), Pollock, M.R., observed that "it is a well-recognised principle that, in revenue cases, regard must be had to the substance of the transactions relied on to bring the subject within the charge to a duty, and that the form may be disregarded." The word "form" as used here is understood in a comprehensive sense so as to include the legal position of any particular transaction. This case turned upon the interpretation of the language of section 52 of the Finance Act, 1920, which related to "the profits of a British Company carrying on any trade or business, or any undertaking of a similar character including the holding of investments." As regards the Eccentric Club it was admitted that the Company was a British Company. It was held by Mr. Justice Rowlatt that it was carrying on business. The Limited Company was formed for the purpose of carrying on the Eccentric Club. It was urged by the Crown that the Company was carrying on the business of the Club. The Club contended that, although in form it was a Company, it did not carry on any trade or business in any just appreciation of those terms, that its object was not business, but to promote social intercourse, and that the Club and the Company did not seek gain nor did their activities result in profits. With the observation cited above the Master of the Rolls held, on appeal, that the Company here did not satisfy the requirement of being a Company carrying on trade or business within the meaning of section 52 of the Finance Act, 1920. Warrington, L. J., concurred in the view, observing as follows :—

(1) [1924] 1 K. B. 390 ; 12 T. C. 657.

" I think the proper mode of regarding the Company in the present case is a convenient instrument or medium for enabling the members to conduct a social club the objects of which are immune from every taint of commerciality, the transactions of sale and purchase being incidental to the attainment of the main object. What is in fact being carried on, putting technicalities aside, is a members' club and not a proprietary club nor any undertaking of a similar character. " The learned Lord Justice further observed that in such a case one may go behind technicalities and look at the substance.

A critic says with reference to the principle enunciated above by the Master of the Rolls : " This doctrine was evolved by the Crown in order to defeat 'legal evasion' whereby the tax-payer so arranged his affairs as not to attract tax to what was, in the lay sense, his income."(1) Whether it is just to fix this odium on the Crown as a rule is a debatable point, since in some cases at least, as for instance, in the *Eccentric Club* case (2), *ante*, it is the assessee and not the Crown that reaps the benefit of the principle.

The House of Lords gave the doctrine very careful consideration in *Commissioners of Inland Revenue* v. *Westminster (Duke of)*(3), where Lord Tomlin exposed the basis on which it had grown up. " This supposed doctrine (upon which the Commissioners apparently acted) ", observed his Lordship, " seems to rest for its support upon a misunderstanding of language used in some earlier cases. The sooner this misunderstanding is dispelled, and the supposed doctrine given its quietus, the better it will be for all concerned. " This case is now authority for the view that " every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow tax-payers may be of his ingenuity, he cannot be compelled to pay an increased tax."(4) Even Lord Atkin who gave a dissentient judgment against the respondent Duke conceded that " it has to be recognized that the subject, whether poor and humble or wealthy and noble, has the legal right so to dispose of his capital and income as to attract upon himself the least amount of tax. "(5)

(1) The Law Quarterly Review, Vol. LV (1939), P. 345.
(2) [1924] 1 K. B 390 ; 12 T. C. 657.
(3) [1936] A. C. 1, 19 T. C. 590.
(4) [1936] A. C. at pp: 19-20, per Lord Tomlin.
(5) [1936] A. C. at P. 8, per Lord Atkin.

It is thus now beyond the region of doubt that the so-called 'substance' doctrine can no longer be availed of to bring a person within the net of tax when his transaction has been so arranged as not to fall within the strict letter of the law when the transaction is properly construed.

But has this doctrine now yielded place to a new doctrine of a contrary character—namely, that the form of a transaction must be taken into consideration and not the substance? Commenting (1) on the decision of the Court of Appeal in *United Steel Companies* v. *Cullington* (2), the learned critic referred to above has expressed the view that such a change has occurred. In this case the material facts were that a railway company, in consideration of the payment to it of £180,000 by equal monthly instalments over a period of ten years, agreed to close down its manufacturing steel works for this period and to place the whole of its requirements with the appellant companies during the ten years. It was urged on behalf of the appellant companies that the real object of the contract was to enable the appellants to obtain a new customer, that no asset came into existence as a result thereof, and, further that the payment by instalments over a long period of years, emphasized the revenue nature of these payments. The Court of Appeal negatived these contentions. As regards the first point urged, the learned critic observed that "this cuts across the *now accepted doctrine* that in revenue cases 'the form and not the substance of a transaction *must be* regarded'" (Italics ours). And in support of this doctrine he points to the authority of the *Duke of Westminster's* case (3).

It is to be seen whether the Lords have actually set their *imprimatur* on such a revolutionary doctrine and how far it will bear scrutiny in the light of cases, both prior and subsequent to the *Duke's* case (3), in which this question of form and substance came up for discussion, as also the *Duke's* case (3) itself, which will be considered last.

In *Commissioners of Inland Revenue* v. *Adam*(4), the respondent was a carting contractor. In the course of his business as a carting contractor it was necessary for him to cart away and dispose of earth, slag, etc. For this purpose he entered into an eight years' agreement by which he got the right to deposit the said material

(1) The Law Quarterly Review, Vol. LVI, (April, 1940), P. 147.

(2) (No. 2) (1939) Tax Cases Leaflet No. 1041.

(3) [1936] A. C. 1.

(4) (1928) 14 T. C. 34.

on certain land. He undertook to dump a minimum of 80,000 cubic yards of material during this period at the rate of 10,000 yards a year. In consideration of this right he agreed to pay to the owner of the land £3,200 payable by half-yearly instalments of £200 and in addition a sum of 4 sh. for every 5 cubic yards of material in excess of 80,000. The respondent entered the £3,200 in his yearly balance sheet as a capital asset representing the worth of the right to use the land and wrote off £400 each year and charged £400 to revenue.

The question was whether in computing his profits for income tax purposes the respondent was entitled to deduct the two half-yearly payments from his gross profits. The respondent's contention was that these payments were an expense of business which should be admissible as a deduction. The Crown, on the other hand, contended that the sum of £3,200 was capital expenditure or alternatively that the instalments were annual payments, the allowance of which was prohibited by Rule 3(1) of the rules applicable to Cases I and II, Schedule D, of the Income Tax Act. It was held by the Court of Sessions (Lord Clyde, Lord Sands, and Lord Morrison, Lord Blackburn dissenting) that the £3,200 was payment for a capital asset and as such was not an admissible deduction.

In the course of his judgment the Lord President (Clyde) observed: "A great deal has been said about form and substance. I think, that, in a question of this sort, both form and substance must be considered; because the form of the transaction by which the respondent acquired the right to dump waste soil may bear very materially on the question of the capital or revenue character of outlay made to acquire it. Suppose that the consideration for the right to dump waste soil had been an annual rent of the site stipulated for as such, it would, I think, have been difficult to displace the view that the rent was a proper revenue charge. But (the contract taking the form it does) it is equally difficult to put out of view the fact that the consideration is not a rent but a capital price. The contract might easily have assumed either form, and would have suited the respondent equally well either way."

Lord Sands who agreed with the Lord President observed: "In a matter of this kind one cannot altogether ignore form. When parties contract in certain forms different results may flow according to the form of the contract, however little difference there may be in substance."

In *Boyce* v. *The Whitwick Colliery Co. Ltd.* (1) an Urban District Council entered into an agreement with a colliery company for the supply of water by the latter to the former. The colliery company had, for the purpose of working their coal mine, to pump a good deal of water out of the mine and, instead of letting it run to waste the Council were anxious to secure the benefit of that water and to use it for the re-sale to their individual customers within their area. The terms of the agreement, *inter alia*, were: that the company should erect (according to designs, specifications and tenders and previously approved by the Council's engineer) such buildings, plant, etc., as were necessary for the pumping, distribution, etc., of the water, and that the Council should pay annually to the company (1) a fixed sum; (2) a sum equal to one-thirtieth of the cost of the works: (3) interest on any portion of such cost for the time being unpaid; and (4) a sum of 1d. per thousand gallons of water supplied. The agreement was to remain in force for 30 years (with an option of renewal to the Council subject to a variation of the payments) at the end of which the buildings, plant, etc., were to remain the property of the colliery company, but in the event of the company ceasing to work its collieries during the period of the agreement, the Council were to be allowed to continue pumping the water. The question was whether the respondent company were liable to be taxed in respect of a sum which represented two half-yearly payments, each being 1/60th of the costs of the works. The respondents' contention was that these payments represented a capital repayment by the Council of the sums expended by the respondents in erecting the works. The Crown contended that they were income or business receipts received by the respondents in course of their business.

The District Council, in their turn, in the companion case (2), claimed to deduct the same payments as revenue expenditure in their lands.

Mr. Justice Finlay held that these payments were income receipts in the hands of the respondent company in the one case and revenue expenditure in the case of the Appellant Council in the other case. The Court of Appeal reversed these decisions, holding that these payments were repayments of the capital cost of the works and were, accordingly, capital receipts not assessable to income-tax in the hands of the colliery company and capital

(1) (1934) 18 T. C. 655.
(2) *The Coalville Urban Dist. Council* v. *Boyce*, 18 T. C. 655.

expenditure on the part of the Council not admissible as deductions in computing its profits.

Lord Hanworth, M. R., in course of his judgment, observed: "It must be borne in mind that in all these cases we have to look at the substance of the matter. Perhaps the best authority for that is the statement made in the speech of Lord Halsbury in the case of the *Secretary of State for India* v. *Scoble* (1) where he says this: 'Looking at the whole nature and substance of the transaction (and it is agreed on all sides that we must look at the nature of the transaction and not be bound by the mere use of the words)' ".

In *Commissioners of Inland Revenue* v. *Ramsay*, (2) there was an agreement for the sale of a dentist's practice in consideration of a purchase price of £ 15,000, payable by the payments of £5,000 down and 25 per cent. of the profits of the practice for ten years with certain provisions as to certain other contingencies. The Court of Appeal held, reversing the decision of Finlay, J., that these annual payments were payments of a capital sum in discharge of the debt for payment of the purchase price and were not in any sense income. Both Lord Wright, the Master of the Rolls, and Lord Justice Romer made it clear that two types of transactions were very commonly met with in human affairs. One might sell a capital asset for instalments of the purchase price or one might convert the principal debt into a true income annuity. Under which of these types a particular bargain came was to be ascertained by a careful analysis of that bargain itself. Romer, L. J., put the matter thus:—"If a man has some property which he wishes to sell on terms which will result in his receiving for the next twenty years an annual sum of £ 500, he can do it in either of two methods. He can either sell his property in consideration of a payment by the purchaser to him of an annuity of £ 500 for the next twenty years, or he can sell his property to the purchaser for £ 10,000, the £ 10,000 to be paid by equal instalments of £ 500 over the twenty years. If he adopts the former of the two methods, then the sums of £ 500 received by him each year are exigible to income tax. If he adopts the second method, then the sums of £ 500 received by him in each year are not liable to Income Tax, and they do not become liable to Income Tax by it being said that in substance the transaction is the same as

(1) [1903] A. C. at page 302.
(2) (1935) 20 T. C. 79.
(3) 18 T. C. 655 at p 677.

though he had sold for an annuity. The vendor has the power of choosing which of the two methods he will adopt, and he can adopt the second method, if he thinks fit, for the purpose of avoiding having to pay income tax on the £ 500 a year. The question which method has been adopted must be a question of the proper con struction to be placed upon the documents by which the transaction is carried out" (1).

Dott v. *Brown* (2) illustrates the same principle. The facts of the case were as follows. By an agreement of compromise in respect of a sum of money owed the respondent, *inter alia*, covenanted to pay to the appellant two sums of £ 1000 each on the dates therein mentioned and £250 on each succeeding March 31, so long as the appellant should live, such covenant to bind the respondent's estate after his death. It was held by the Court of Appeal that the annual payments were instalments of capital and not of income and the respondent was not entitled to make any deductions in respect of income tax. Scott, L. J., argued thus: "Now, in the contract you get first of all the provisions that the shares are to be assigned. Well, there is nothing of income here. Then there is the benefit of a certain deed—we do not know anything about that. Then you come to the covenant in question, and it is to pay £ 1,000 on March 31, 1933, and another a year later and then £ 250. Stopping there, there is no reason to treat any one of these payments—the £ 1000 payments or the £ 250 payments —as anything more than instalments of purchase price, and in fact the two £ 1000 payments were so treated and paid in full. Why, then, should one presume that the parties in the transactions intended the £ 250 to be in any sense different in nature to the two £ 1000 payments—it was all in the same clause—no distinction" (3). The learned Lord Justice reviewed a number of cases including *Ramsay's*, *ante*, (4) and deduced the following principle therefrom: "A consideration of the cases shows that you have to examine the details of a particular transaction out of which the payment arises and make up your mind as to the substance of it—the reality of it—not being bound or guided unduly by particular terms and bearing in mind always that the words are not conclusive and may be misleading, and being very careful not to

(1) (1935) 20 T. C. 79 at p. 98.
(2) (1936) 1 All. E. R. 543.
(3) (1936) 1 All. E. R. 543 at pp. 551-2.
(4) (1935) 20 T. C. 79.

treat a particular signpost in one case as conclusive of another case on different facts" (1).

The decision of Lord Justice Scott in *Dott* v. *Brown*, *ante* (2), was followed by Mr. Justice Lawrence in *Commissioners of Inland Revenue* v. *Ledgard* (3). In this case the question was whether the purchase money for a deceased partner's share was capital or income for the purposes of income tax. The partnership deed provided that the purchase money for the share of a deceased partner should be such a sum as his personal representative and the surviving partners might agree upon, and failing agreement, a sum equal to one-half of the share of profits for three years commencing from the first day of the month immediately following the death of such partner which would have been payable to such deceased partner had he continued to be a partner during those three years. The decision of the firm's auditors for the time being as to the amount of the purchase money payable was to be final and binding on all interested parties, and no payment on account of such purchase money was to be required until it had been actually ascertained unless the remaining partners were willing to make payments on account. The learned Judge followed the principle laid down by the Court of Appeal in *Ramsay's* case (4), that the real substance of the transaction is the matter which must be considered and on a proper construction of the partnership agreement, guided by the observation of Scott, L. J., in *Dott* v. *Brown*(2), *ante*, held that the sum payable, though calculated on the income basis, was a single capital sum to be paid at the end of three years when ascertained and the respondents were not accordingly entitled to deduct the same.

The proper construction of an agreement also formed the crux of the whole case in *Race Course Betting Control Board* v. *Wild* (5). In this case the appellant Board was created for the purpose of operating totalisators by reference to the Race Course Betting Act, 1928. Under an agreement between the Board and the Manchester Race Course Company Limited, the Company was to erect buildings on plans approved by the Control Board for the purpose of housing totalisators and to license those buildings to the Control Board under certain terms the relevant of which were :—

(1) (1936) 1 All E. R. 543 at p. 548.
(2) (1936) 1 All. E. R. 543.
(3) (1937) 2 All. E. R. 492; 21 T. C. 129.
(4) (1935) 20 T. C. 79.
(5) (1938) 4 All. E. R. 487 ; 22 T. C. 182.

(1) The company granted to the Board for a term of 21 years the exclusive right of user of those buildings; (2) the company undertook to maintain the buildings in good repair and to pay all rates and taxes up to a certain amount and to insure the buildings against fire and other risks; (3) the deed of agreement did not operate as a demise of any part of the company's premises or create the relation of landlord and tenant; (4) for the right of user the Control Board was to pay to the company an annual sum of 12½ per cent. on the cost of construction of the buildings which cost was agreed at £27,500. Then followed a declaration that this annual sum was a yearly consideration in respect, not only of enjoyment and exercise of the right of user, but also of repayment by yearly instalments of the capital value of the cost of construction to the company. The question was whether in computing its profits for assessment to income tax the Board was entitled to deduct as a revenue expenditure the full amount which it had to pay for the user. The answer to that question, observed Macnaghten, J., must depend on the provisions of the deed under which the payment was made. The Crown contended that the substance should govern the decision. The Appellant Board, on the other hand, urged that one could only look at the legal obligation of the parties under the document in the case, whatever it might be and they relied on the decision of the House of Lords in the *Duke of Westminster's* case (1). The learned Judge accepted the contention of the Board and held that the annual sum paid by the Board was a revenue payment. The principle that weighed with him was put thus: "It is said and truly said, that whether a payment is a revenue payment or a capital payment may depend upon the angle from which you look at it. The payment may be revenue payment from the point of view of the payer and a capital payment from the point of view of the receiver and, *vice versa*, it may be a revenue payment from the point of view of the receiver and a capital payment from the point of view of the payer. The fact that the sum payable by the Board is a sum which, over a period of years, will recoup to the Race Course Co. nearly the whole of the cost of the erection of the buildings and at the same time give a reasonable return on the money that they have invested is, I think, immaterial. The question is whether or not under this document you can spell out any obligation on the part of the Board to make a capital payment to the Race Course Company (2)."

(1) [1936] A. C. 1; 19 T. C. 490.
(2) (1938) 4 All. E. R. 487 at pp. 490-1; 22 T. C. 182 at p. 188.

In the *Duke of Westminster's* case (1) the respondent Duke by a deed covenanted to pay a gardener in his employment a certain yearly sum by weekly payments of a certain amount for a period of seven years or during the joint lives of the parties, whichever was shorter, and it was agreed that the payments were without prejudice to the remuneration to which the gardener should be entitled for services, if any, thereafter rendered. Before the deed was executed the respondent's solicitors on his instructions wrote to the gardener a letter which explained to the latter that the deed did not prevent him from being entitled to, and claiming, full remuneration for such future work as he might perform for the appellant, but that he was expected to be content with the addition of such sum, if any, as might be necessary to bring the total periodical payments while he was still in the respondent's service up to the amount of the salary or wages which he had lately been receiving. The employee acknowledged the letter and accepted the payment. It was argued by the Crown that the letter written by the Duke's solicitors to the covenantee and the acknowledgment signed by the covenantee at the foot of the letter effected a complete change in the situation and turned the payments made under the deed into payment of salary and wages within Schedule E. The House of Lords took a different view: "The acknowledgment signed by the covenantee." observed Lord Russell, "is in strictly limited terms. It accepted the provision made by the deed; it in no way admits or suggests that the deed has to any extent been qualified by the letter." Lord Macmillan likewise observed: "It is difficult to see how a sum which is payable irrespective of employment can be said to be a profit arising from employment. If the collateral documents had affected the absolute and independent nature of the obligation under the deed of covenant different considerations might have arisen. But the absolute obligation to pay irrespective of employment remains unaffected by the collateral documents." Having regard to the genuine character of the deed the House of Lords held (Lord Atkin dissenting) that the sums paid yearly under the above-mentioned documents were annual payments and were not payments of salary or wages and, consequently, that the respondent, being entitled to deduct tax from the payments, was entitled to deduct the payments themselves in arriving at his total income for the purpose of sur-tax.

Two later cases which came up to the House of Lords should

(1) 1936] A. C. 1; 19 T. C. 490.

receive attention in this connection as an aid to further elucidation of the doctrine under notice.

In *Cameron* v. *Prendergast* (1) the appellant who had for many years been a director of a company notified his fellow-directors of his intention to resign. The other directors thereupon wrote asking him not to serve notice of resignation, saying that in consideration of his not doing so the company would pay him £45,000, and would enter into a formal deed to that effect. The appellant accepted the offer. Moreover, he agreed to remain a director at £400 per annum, on the understanding that he would devote less time in the future to the company's business. Previous to the execution of the deed he had received a salary of £1,500 per annum. The question was whether the appellant was liable to income tax in respect of the sum of £45,000 as being a profit arising from the office of director under Schedule E of the Income-tax Act. On behalf of the appellant attempts were made to utilize in his favour the observations made in the *Duke's* case(2), *ante*, by Lord Tomlin and other noble Lords as to the importance of giving effect to the proper legal interpretation of documents, provided they are *bona fide* and not only used as a cloak to conceal a different transaction. But the Lord Chancellor (Viscount Caldecote), while observing that his Lordship had no intention of departing in any way from what was laid down in the *Duke's* case(2), pointed out that the case was not at all helpful to the appellant. The Lord Chancellor observed: "In this case, the substance and the form of the documents seem to me to be the same. The appellant was anxious to retire, and, but for the inducement offered to him to do so, he would have signed a notice of resignation. The company valued his services, and they were prepared to pay a large sum to him to induce him to abstain from his intention to resign and thus to continue as director" (3).

It was urged that the only consideration for the payment was the act of the appellant in acceding to the request of the company not to serve the notice of resignation. The Lord Chancellor rejected such a contention with this observation: "I can see no difference between a promise not to resign and a promise to continue to serve as director" (3).

The case of *Hughes* v. *Utting* (*B. G.*) & *Co.* (4) furnishes,

(1) [1940] A. C. 549; (1940) 2 All. E. R. 35.
(2) [1936] A. C. 1; 19 T. C. 490.
(3) [1940] A. C. at p. 554; (1940) 2 All. E. R. at p. 38.
(4) [1940] A. C. 463; (1940) 2 All. E. R. 76.

in the words of Lord Romer, a remarkable illustration of the confusion which may result from the use of inaccurate language. In this case the respondent company carried on the business of speculative builders, building houses upon land owned by them, and, upon the completion of the building, disposing of some of the houses by granting a 99 years' lease in consideration of a premium paid in cash and the reservation of a ground rent. The respondents never sold any ground rents, but always retained their reversionary estate in the houses. The question was whether the capitalised value of the ground rent should be brought into the company's profit-and-loss account as a trading receipt.

The Crown's contention was shortly this: The respondents had disposed of the houses in question by granting a ninety-nine years' lease in consideration of the premium and the ground rent, or at any rate had realised their whole interest for the term of ninety-nine years. The ground rent must be regarded as money's worth and was not different in principle from the premium. Since money or money's worth alike must be brought into the account as a trading receipt, the realizable value of the ground rent must be ascertained for the purpose of the profit-and-loss account. The respondents, on the other hand, denied that they had parted with the whole of their interest in the houses, even for the term of 99 years. As long as the reversionary estate was retained, the respondents claimed to treat the houses as part of the stock-in-trade of their business.

The difficulty arose, as has already been pointed out, from the inaccuracy of language used in the forms of agreement employed on the occasion of granting the leases. By these agreements in which the proposed lessee was described as "the purchaser", the company purported to agree "to sell" and the lessee purported to agree to "purchase by way of lease", for the sum specified therein, the particular land and house in question. The Inspector of Taxes, relying on the language, treated the leases granted thereby as being in truth sales of the houses in question. As Lord Russell pointed out, the inaccurate language used might have been the foundation of the statement of the Commissioners that the company's houses when completed were "disposed of by the Company by way of sale" and might have led the Commissioners to regard the granting of a lease as a complete and final realisation by the company of its profit on that particular plot of land. Regarding the Crown's contention, Viscount Maugham observed.(1) "We were

(1) [1940] A. C. at pp. 470-1; (1940) 2 All. E. R. at P. 79.

urged to say that the freehold interests retained were in substance wholly new interests, and that, again, 'in substance' the respondents had parted with their rights in the lands for 99 years. This, of course, wholly neglects the legal aspect of the case, and, as I think, disregards also the popular and practical view of the position. The landlord in such a case has a good deal more than his right to the rent."

In the opinion of the Lord Chancellor (Viscount Caldecote), the key to the solution of the question was to be found by keeping in view the *real transaction*. What the respondent company, in his Lordship's view, had disposed of was not the houses, but a leasehold interest, retaining the reversionary estate; they had not yet disposed of their property so far as the houses in question were concerned. Lord Russell said that "until the company sells the reversion (and the Commissioners find that the company has not yet sold any reversion) the company has not ceased to be interested in the plot, and its profit on the realization of the plot has not been finally ascertained" (1). The appeal was dismissed by their Lordships, holding that until the realization of the reversionary estate, the ground rent ought not to be brought into the company's accounts as a trading receipt.

The one common feature that is noticeable in all the cases discussed above is that the learned Judges and the noble Lords have depended on the facts of each particular case as the unfailing guide. Indeed, there is no simple touchstone to be applied in any case (2). Nor is it safe to treat any particular sign-post in one case as conclusive of another case on different facts(3). "It has often been tried", said Lord Hanworth, M. R., "to lay down some sort of principle which shall be a guide in these cases, but I confess that I think one has to look at each case and the facts of each case."(4) This view has been echoed on innumerable occasions. See, for a recent instance, *British Salmson Aero Engines* v. *Inland Revenue Commissioners* (5), where Finlay, J., said with reference to *Ramsay's* case (6), *Dott* v. *Brown* (7) and *Ledgard's* case(8): "Really I do

(1) [1940] A. C. at P. 472; (1940) 2 All. E. R. at P. 80.
(2) (1929) 14 T. C. at P. 622, per Lord Hanworth, M. R.
(3) (1936) 1 All. E. R. at P. 548, per Scott, L. J.
(4) (1934) 18 T. C. at P. 680.
(5) (1937) 3 All. E. R. 464; 22 T. C. 29.
(6) (1935) 20 T. C. 79.
(7) (1936) 1 All. E. R. 543.
(8) (1937) 21 T. C. 129.

not think if those cases are read that one gets very much beyond this, that the question of capital or income is a question to be decided upon a survey of the particular facts in each particular case. There are certain 'sign posts', as I think Scott, L. J., called them, but there is no real governing indication...............One has, therefore, to look at the facts of the case, and to decide upon which side of the line the case falls." If the form of the transaction, that is a deed, covenant, document or agreement reflected the genuine state of affairs, the learned Judges did not go behind it, however adverse might be the result from the standpoint of the Revenue. But in each case the dominant concern of the Judges was to get at the substance of the transaction as evidenced by the form legally and genuinely adapted for the purpose.

In fact, the real doctrine of "substance", if by that is meant that substance should be the governing consideration in every revenue case, has never demanded the discarding of form altogether. It is only its spurious variety that will be as audacious as that. As Lord Tomlin pointed out in the *Duke's* case (1), this latter doctrine, which the noble Lord qualified with the epithet "supposed", rests on a misunderstanding of language used in some earlier cases. His Lordship cited the two passages that are relied upon by the advocates of the misconceived 'substance' doctrine and pointed out their real import. The first passage is from the opinion of Lord Herschell in *Helsby* v. *Mathews*(2). "It is said that the substance of the transaction evidenced by the agreement must be looked at, and not its mere words. I quite agree." But Lord Herschell went on to explain "that the substance must be ascertained by a consideration of the rights or obligations of the parties to be derived from a consideration of the whole of the agreement." "In short", said Lord Tomlin, "Lord Herschell was saying that the substance of a transaction embodied in a written instrument is to be found by construing the documents as a whole." The second passage is an observation of Lord Halsbury in *Scoble's* case (3): "Still, looking at the whole nature and substance of the transaction (and it is agreed on all sides that we must look at the nature of the transaction and not be bound by the mere use of the words) this is not the case of a purchase of an annuity." Here again, pointed out Lord Tomlin, Lord Halsbury was only giving utterance to the indisputable rule that the surrounding circumstances must be regarded in construing a document.

(1) [1936] A. C. 1; 19 T. C. 490.
(2) [1895] A. C. 471 at P. 475.
(3) [1903] A. C. 299 at P. 302.

The real nature of the "substance" doctrine was summarised by Lord Russell in the *Duke's* case (1), thus: "If all that is meant by the doctrine is that having once ascertained the legal rights of the parties you may disregard mere nomenclature and decide the question of taxability or non-taxability in accordance with the legal rights, well and good. That is what this House did in the case of *Secretary of State in Council of India* v. *Scoble* (2); that and no more. If, on the other hand, the doctrine means that you may brush aside deeds, disregard the legal rights and liabilities arising under a contract between parties, and decide the question of taxability or non-taxability upon the footing of the rights and liabilities of the parties being different from what in law they are, then I entirely dissent from such a doctrine".

It is just possible—a possibility which Lord Tomlin did not fail to take note of in the *Duke's* (1) case—that there may be cases where documents are not bona fide nor intended to be acted upon but are only used as a cloak to conceal a different transaction (3). But, as Romer, L. J., pointed out in the same case (4), it is not permissible, under the plea of looking at the substance of the matter, to rewrite contracts between the parties.

The detailed analysis of cases and the chain of authorities cited, which speak for themselves, justify the assertion that the relation between "substance" and "form" stands on a footing analogous to that between "the intention of the legislature" and "the language used" by it in giving expression to such intention, which relation is best expressed by Tindal, C. J., thus: "The only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statutes are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do, in such case, best declare the intention of the law-giver" (5). Likewise, if the "form" of a transaction in a revenue case reflects the genuine position, reference to that form alone is legitimate for the purpose of getting at the "substance." As has been observed by Lord Wright, "the true nature of the legal

(1) [1936] A. C. 1 at p. 25.
(2) (1903) A. C. 299.
(3) [1936] A. C. at p. 21.
(4) [1936] 19 T. C. at p. 509.
(5) The Sussex Peerage Case, (1844) 11 Cl. & Fn. 85 at p. 143.

obligation and nothing else is 'the substance'" (1). It is quite clear that here the noble Lord has '*the substance*' and nothing else in view; he has only pointed out what 'the substance' is in the particular case. This view is in no way different from what the same noble Lord expressed not in the House of Lords but as the Master of the Rolls in *Ramsay's* case (2): "The decision in any particular case can only be arrived at by considering what is the substance of the transaction in question, and what is the substance of that transaction can only be ascertained by a careful consideration of the contract which embodies the transaction". Thus, in the last analysis, "substance" still remains the supreme guide in revenue cases, only its determination is not left to unrestrained speculations. "Form" is important only because and in so far as it guides the determination of the real substance.*

(1) [1936] A. C. at p. 31.
(2) 20 T. C. 79 at p. 94.

* No Indian Case could be discussed in the article since there was none reported till we went to press in which the doctrine under notice had come up for discussion. Two cases have since been reported. In *The Bank of Chettinad Limited* v. *Commissioner of Income Tax, Madras* (3), the Judicial Committee (per Sir Lancelot Sanderson) reiterated their disapproval of the suggestion that in revenue cases 'the substance of the matter' may be regarded as distinguished from the strict legal position. In *Commissioner of Income Tax, Bihar & Orissa* v. *Kumar Kamaksha Narain Singh* (4), which was heard by a Special Bench, Monohar Lall, J., considered the "substance" doctrine in detail in the light of reported English decisions.—B. L. P.

(3) (1940) A. I. R. P. C. 183.
(4) (1940) A. I. R. Pat. 633.

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did not perform the two demands as required by the Muslim Law of pre-emption.

In view of this finding the question of the price paid or agreed to be paid by defendants Nos. 2 to 5 to defendant No. 1 does not arise. But an issue was raised on this point in the trial Court. The Subordinate Judge has recorded a finding on this point. It is therefore necessary to determine this point.

In the Kobala the consideration was stated to be Rs. 20,000. There is a recital in the Kobala that Rs. 8,500 was paid in cash on the date of the execution of the Kobala. The trial Judge has found that only Rs. 500 was paid on the date of the execution.

I agree with this finding of the trial Judge in view of the evidence in the case. I hold that the real price fixed for the sale was only Rs. 12,000.

The result, therefore, is that this appeal fails and is dismissed with costs to respondents Nos. 2 to 5.

No order is necessary on the application presented on 1st February, 1937.

Rau, J. :—I agree and would add only a few words as to the evidence on the question of adoption. P. W. 12 Babu Ramesh Ranjan Das, a senior pleader of Sylhet, has stated in his evidence that Swarnamayee, when she came to Sylhet to swear an affidavit in connection with the probate of her husband's Will—this must have been sometime in 1921, the date of the grant being April 1, 1921—said to him in the course of conversation : "Now that a son has been born to my daughter, what would I do by adopting a son?" In my humble opinion there is no sufficient reason to disbelieve the witness on this point : Swarnamayee may well have made such a remark. It was not unnatural that for sometime after the birth of a son to her daughter in 1920 she should have been asking herself whether there was any longer any object in exercising the power of adoption given to her. But it does not at all follow that she did not ultimately in 1922 overcome her initial doubts and decide to adopt. There is evidence which has been believed by the learned Subordinate Judge and which we have no ground for disbelieving, that she did in the end perform the necessary ceremonies and make or complete the adoption.

A. T. M. *Appeal dismissed.*

Before Mr. Justice Syed Nasim Ali and Mr. Justice B. K. Mukherjea.

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August, 12, 13, 14, 15, 16, 19, 21.

RAJA JANAKI NATH RAY AND OTHERS

v.

JYOTISH CHANDRA ACHARYA CHOWDHURY AND OTHERS.*

Hindu widow—Deed of surrender—Surrender, effect of—Immediate reversioner, a female—Accelerated interest—Actual reversioner's interest, when can be affected by the immediate female reversioner—Reversioner, when takes the interest—Surrender, if can be made in favour of stranger—Basis of doctrine of surrender—Consent, effect of—Protection of husband's property—What is reasonable provision for maintenance—Surrender to daughter—Burden of proof—Limitation Act (IX of 1908), section 8, Schedule I, Article 120—Suit for declaration as to invalidity of surrender—Right to sue, when arises—Reversioner, presumptive, not born, when the cause of action arose—Minority.

Per Curiam: The basis of the doctrine of surrender by a Hindu widow is the effacement of the widow's interest.

Per Nasim Ali, J.: The basis of the doctrine of surrender by a Hindu widow is not the *ex facie* transfer by which such effacement is brought about. The result merely is that the next heir of her husband steps into the succession in the widow's place There is no difference between surrender to a daughter and surrender to the nearest male reversioner: *Vytla Sitanna* v. *Marivada Viramma* (1). The voluntary self-effacement is sometimes referred to as a surrender, sometimes as a relinquishment or abandonment of her rights. It may be effected by any process having that effect provided that there is a *bona fide* and total renunciation of the widow's right to hold the property: *Bhagwat Koer* v. *Dhanukdhari Prashad Singh* (2). The surrender cannot be considered *bona fide* if the arrangement is for dividing the estate with the reversioner: *Sreemati Radharani Dassya* v. *Sreemati Brindarani* (3). Reasonable provision for the maintenance of the widow regard being had to the position in life of her husband and the size of her estate is not an arrangement for dividing the estate with the reversioner: *Vytla Sitanna* v. *Marivada Viramma* (4). What is a reasonable provision for the maintenance of the immediate female reversioner, is a question of fact.

Per Mukherjea, J.: The reversioners take the estate not merely when the

* Appeal from Original Decree No. 220 of 1936, against the decree of Babu Surendra Nath Mitra, Subordinate Judge of 24-Parganas, 2nd Court, dated 30th June, 1936.

(1) (1934) L. R. 61 I. A. 200 (207-8); 59 C. L. J. 354 (358-9).
(2) (1919) L. R. 46 I. A. 259 (270-1); I. L. R. 47 Calc. 466.
(3) (1938) 69 C. L. J. 174; 43 C. W. N. 337 (P. C.).
(4) (1934) L. R. 61 I. A. 200; 59 C. L. J. 354.

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widow dies but also when her title is extinguished, for instance, by renunciation, re-marriage or the like.

It is the self-effacement by the widow or the withdrawal of her life estate which opens the estate of the last owner to his next heirs on that date: *Vytla Sitanna* v. *Marivada Viramma* (1).

No surrender and consequential acceleration of the estate can be made in favour of any body except the next heir of the husband.

By surrendering the estate the widow brings about the same result as would happen in the case of her natural death and the next heir steps into the inheritance as a matter of law without any act of consent or acceptance on his part. The fact that the immediate reversioners are female heirs who take only a limited interest in the property does not make any difference, and a surrender in favour of such limited heirs is equally effective though the interest which they take in the property is not thereby enlarged: *Vytla Sitanna* v *Marivada Viramma* (2).

Per Nasim Ali, J.: Under Hindu law, a Hindu widow in possession of her husband's estate can relinquish, and by relinquishing anticipate for the reversioners their period of succession. The acceleration does not depend upon the consent of the immediate reversioner. Where the immediate reversioner is a male, the accelerated interest vests in him absolutely and can deal with it as he likes Where the immediate reversioner is a female and the accelerated interest is the interest of a limited owner, she can only deal with her limited interest. She cannot by her dealing affect the interest of the actual reversioners unless by her consent she effaces her own limited interest and thereby accelerates the absolute interest of the second male reversioner.

The second part of the rule in the case of *Protap Chunder Roy Chowdhry* v. *Sreemutty Joy Monee Dabee Chowdhrain* (3) cannot be extended to the consent of immediate reversioners being females, unless their consent amounted to an effacement of their life interest or surrender according to Hindu law except an alienation for legal necessity and thereby destroy the interest of actual owners :*Chinnaswami Pillai* v. *Appaswami Pillai* (4) distinguished.

Per Mukherjea, J.: A widow can, with the consent of her daughter, who is the next heir of her husband, relinquish the estate in favour of daughter's son. But consent given by her must show an intention to efface her own interest completely and circumstances must be such as would entitle the Court to construe the transaction as amounting in substance to a relinquishment by the widow in favour of her daughter and a second surrender by the latter in favour of the next male heir. If the daughter who joins with the mother in the act of surrender reserves for herself as a consideration for the same a substantial part of the property which she is also presumed to surrender, or stipulates for any benefit to her save and except what is necessary for her maintenance, the transaction might amount to a transfer of her own life interest for consideration, but that

(1) (1934) L. R. 61 I. A. 200 (207-8); 59 C. L. J. 358 (351-9).
(2) (1934) L. R. 61 I. A. 200; 59 C. L. J. 354.
(3) (1864) 1 W. R. 98.
(4) (1918) I. L. R. 42 Mad. 25 (29).

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could not give the reversioner in whose favour the surrender is made an absolute interest in the estate to the prejudice of the actual reversioner at the time of her death ;

Chinnaswami Pillai v. *Appaswami Pillai* (1) and *Protap Chunder Roy Chowdhry* v *Sreemutty Joy Monee Dabee Chowdhrain* (2) distinguished.

Maintenance need not be provided in the shape of a periodical pecuniary allowance and there is nothing in law which prevents the surrendering female heir from taking a portion of the immovable property or a lump sum at once for purposes of maintenance provided it is not unreasonable.

A surrendering female heir can always reserve for herself a right to be maintained out of the estate which she surrenders, but the maintenance can be enjoyed by her only during her lifetime. It would be against the spirit of the doctrine of surrender if the widow would stipulate for a maintenance allowance not only to be paid to her during her lifetime, but which would be payable for ever to her heirs and successors.

In the present case although the two daughters gave their consent to the vesting of the entire estate in defendant No. 4 the presumptive reversionary heir of the second degree, yet that consent was not an indication of a voluntary self-effacement on their part and the transaction cannot be upheld on the footing of a surrender.

Per Nasim Ali, J. : Assuming that it is the duty of a Hindu widow to save the estate of her husband the imposition of burden by the deed of surrender on the estate left by the owner already over-burdened with liabilities is not a step leading to the preservation of the estate.

Per Mukherjea, J. : Protection of the husband's estate is no relevant matter for consideration in determining the validity of a surrender by the widow. Whatever be the motives that actuate her, it is always open to the widow to efface herself and put an end to her legal existence.

Assuming that a widow is competent to surrender the estate in favour of her daughter's son with the consent of two daughters who are the immediate heirs, and that it is immaterial that the latter receive consideration for giving their consent, it is necessary to enquire whether the act of the widow herself constitutes a valid surrender according to Hindu law, that is to say was a *bona fide* act of self-effacement on her part, and not a mere device to divide the estate of her husband between the reversioner and her own nominee.

The widow has full power over the income of her husband's estate and a gift of the accumulated income unless she had already chosen to treat it as a part of the corpus, cannot affect the validity of surrender.

Per Nasim Ali, J. : If the actual reversioner brings a suit after the death of the limited owner or owners for possession of the estate of the last full owner and his claim is opposed by persons claiming under alienation by the intermediate limited owners for legal necessity the onus is upon the alienees to prove legal necessity. The claim based on surrender by limited owners does not stand on a different footing.

(1) (1918) I. L. R. 42 Mad. 25 (29).
(2) (1864) 1 W. R. 98.

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In a suit by presumptive reversioners for a declaration that alienations by the intermediate limited owner is not binding on the actual reversioners, the onus of proving legal necessity is upon the alienees.

A suit for declaration by a presumptive reversioner that surrender by the limited owners is invalid and does not destroy rights of actual owners is governed by same rule of onus. There are certain exceptional circumstances under which the right of the actual reversioners can be destroyed by the intermediate limited owners. The person pleading those exceptional circumstances must prove them.

Per Mukherjea, J.: A Hindu widow has only restricted powers of alienation with regard to properties she inherited from her husband and it is only under exceptional circumstances that she can confer an absolute title on others. Any person therefore who asserts that he has acquired an absolute title to such property on the basis of an act of surrender or alienation by the widow, must prove that such act was valid and binding on the actual reversioner.

A suit for a declaration by a presumptive reversioner that surrender by widow and her two daughters in favour of one of the daughter's son is invalid and does not destroy the rights of the actual reversioners (the immediate reversioners having been precluded themselves from bringing a suit) is governed by Article 120 and not Article 125, Schedule I of the Indian Limitation Act.

Abinash Chandra Mazumdar v. *Harinath Shaha* (1) referred to.

If the reversioner was unborn at the time when the cause of action arose, the right to sue accrues on the date of his birth, and under section 8 of the Indian Limitation Act he must bring his suit within 3 years from the date of his attaining majority.

Das Ram Chowdhury v. *Tirtha Nath Das* (2) referred to.

A school register in which the age of student is entered is admissible in evidence in question as to the age of a particular student.

Appeal by Defendants Nos. 5 to 7.

Suit for declaration.

The material facts are stated in the judgment.

Messrs. Atul Chandra Gupta and *Bankim Chandra Banerjee* for the Appellants.

Dr. N. C. Das Gupta, Messrs. Jatindra Nath Lahiri, Bepin Chandra Basu, Priya Nath Dutta and *Surajit Chandra Lahiri* for the Respondents.

C. A. V.

The following judgments were delivered:

Nasim Ali, J.:—This appeal arises out of a declaratory suit by a Hindu reversioner.

August. 21.

The property in dispute belonged to Baboo Mohini Mohan Roy who was a Vakil of this Court.

The following genealogy will show the relationship of the plaintiff to the defendants other than the defendants Nos. 5, 6 and 7.

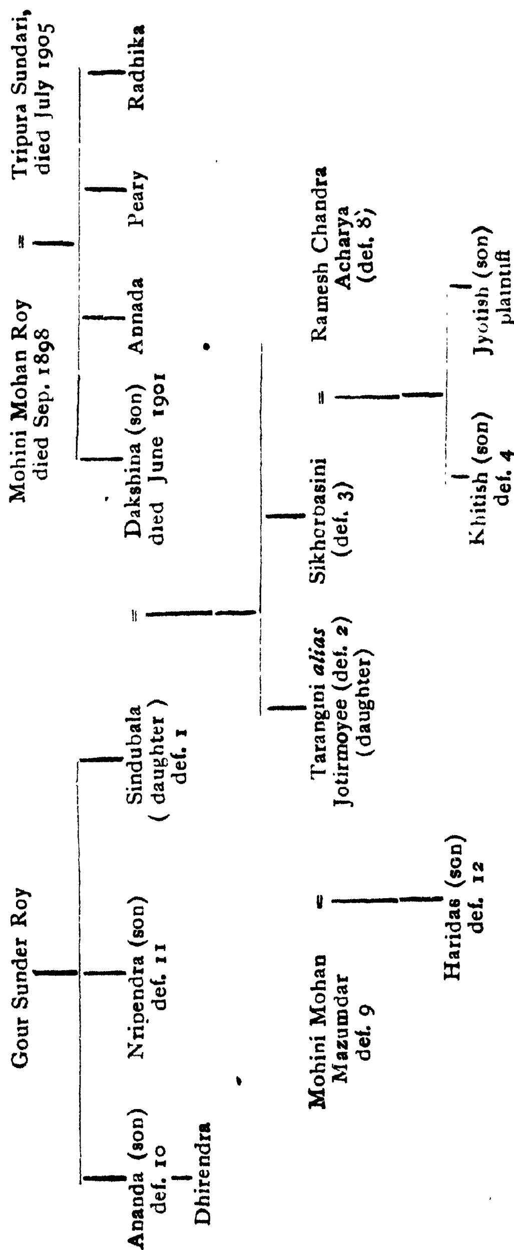
(1) (1904) I. L. R. 32 Calc. 62.
(2) (1923) I. L. R. 51 Calc. 101.

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Defendant No. 2, defendant No. 10 and defendant No. 8 died after the institution of the suit. Defendant No. 2 is represented by her husband and son and defendant No. 10 by his son, Dhirendra.

On August 13, 1905, defendants Nos. 1 to 3 executed a deed (Ex. 1) in favour of defendant No. 4, then a minor, surrendering and relinquishing their right to the properties which Dakshina inherited from his father.

On August 16, 1918, defendant No. 8 as guardian of defendant No. 4 mortgaged the disputed properties to defendant No 5 and the father of defendants Nos. 6 and 7.

On March 18, 1930 the mortgagees purchased the mortgaged properties in execution of a decree obtained on the basis of the mortgage. This sale was confirmed on February 29, 1932.

On May 25, 1932, plaintiff raised the present suit.

His case briefly stated is this :

The deed of surrender executed by defendants Nos. 1 to 3 in favour of defendant No. 4 is invalid under the Hindu Law. The auction sale at which defendants Nos. 5 to 7 have purchased the disputed properties therefore cannot affect the right of the reversionery heirs of Dakshina. Defendant No. 1 made an absolute gift of Rupees 1,20,000 to defendants Nos. 10 and 11, from the estate of Dakshina. This gift is not binding on the reversionery heirs of Dakshina.

He accordingly prayed for a declaration—

(a) that the deed of surrender and all acts done on the strength of the said deed by defendants Nos. 1 to 4 and 8 are not binding against the reversionery heirs of Dakshina.

(b) that the reversionery heirs of Dakshina are entitled to get back from defendants Nos. 10 and 11 Rs. 1, 20, 000.

Defendants Nos. 1 to 3 and 12 did not appear in the suit. Defendants Nos. 4 and 8 filed written statement but did not contest the suit during trial.

Defendants Nos. 5 to 7 filed a joint written statement. Their case is that the suit is barred by limitation and that the surrender by defendants Nos. 1 to 3 in favour of defendant No. 4 is valid in law and that they have acquired absolute interest in the disputed properties on the basis of their purchase at the mortgage sale.

Defendants Nos. 10 and 11 also filed a joint written statement. Their case is that Rs. 1, 20, 000 was paid to them by defendant No. 1 not out of the corpus in Dakshina's estate but out of the income accumulated after death of Dakshina.

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The material issues raised in suit are these—

1. Is the suit barred by limitation?

2. Is the alleged deed of surrender and relinquishment dated 12th August, 1905, by defendants Nos. 1 to 3 of their respective life interest in favour of defendant No. 4 a valid and bona fide deed? Did the entire estate of late Babu Dakshina Mohan Roy vest in defendant No. 4 by the alleged surrender? Is the alleged relinquishment and surrender binding upon the plaintiff?

3. Did the sum of Rs. 1,20,000 claimed appertain to the corpus of the estate of late Babu Dakshina Mohan Roy or was it at the absolute disposal of defendant No. 1?

The trial Judge has answered all the three issues in favour of the plaintiff and has decreed the suit.

Hence this appeal by the defendants Nos. 5 to 7.

The dispute in this appeal between Dhirendra (son of defendant No. 10) and the plaintiff has been settled out of Court.

The points for determination in this appeal are :—

(1) Whether the suit is barred by limitation.

(2) Whether the surrender by defendants Nos. 1 to 3 in favour of defendant No. 4 is valid and binding on all the reversionery heirs of Dakshina.

The first point :—

The deed of surrender was executed on August 13, 1905. Plaintiff was born thereafter. The present suit was instituted on May 25, 1932.

Plaintiff's case is that he was born in 1318 B. S. (1911). The case of the appellants is that he was born in 1908.

P. W. 2 and P. W. 3 support the plaintiff's case. P. W. 2 was an officer under plaintiff's father from 1312 B. S. to 1335 B. S. while the other witness served under him from 1309 B. S. to 1342 B. S.

P. W. 2 says that the plaintiff was born in 1318 B. S.

P. W. 3 says that defendant No. 4 was 1½ or 2 years old when he entered service and that plaintiff was born after he entered service. He also says that the difference in age between defendant No. 4 and the plaintiff is 10 or 11 years. It is clear from the evidence in this case that defendant No. 4 was born in Agrahayan 1307 B. S. The evidence of P. W. 3 therefore materially corroborates the evidence of P. W. 2.

In support of their case the appellants rely on the statement in the school register about the age of the plaintiff. There is no evidence to show on what materials the entry in the register about the age of the plaintiff was made.

Defendant No. 11 stated in his evidence that plaintiff was born in 1313 B. S.

The trial Judge has believed the evidence of P. W. 2 and P. W. 3. The school register has not much evidentiary value. D. W. 11 is vitally interested in the result of this litigation.

In view of these facts and circumstances I agree with the Subordinate Judge that plaintiff was born in 1318 B. S.

It is not disputed in this case that on this finding the plaintiff's suit is within time.

I therefore hold that the suit is not barred by limitation.

Second point :—

The portion of the deed of surrender (Ex. 1) which is material for the purposes of this appeal is as follows :—

First party—Kshitish Chandra Acharyya Chowdhury minor represented by his certificated guardian and father Rames Chandra Acharyya.

Second party—Sindhubala Debi.

Third party—Jyotirmoyee Debi.

Fourth party—Sikharbasini Debi.

"Annada Mohan Roy and Peary Mohan Roy made an application on the 25th July, 1901, in the Original Side of the Hon'ble High Court for obtaining the probate of the Will which was a forged one, on the allegation that it was executed by late Dakshina Mohan Roy on 31st May, 1901............

"On the 10th March, 1903, the said Will was declared to be a forged one and the said probate case was finally dismissed.

"Radhika Mohan Roy ....produced another Will which was a forged one on the allegation that it was executed (by Dakshina Mohan Roy) on the 2nd May, 1901 and made an application on the Original Side of the Hon'ble High Court on the 19th June, 1901 for obtaining probate of the same. In that proceeding...... Sindhubala filed objection. .... Considering and knowing that the prosecution of the suit would entail unnecessary expenditure, waste of time and harrassment and that even in case of success in the case all the expenses incurred and compensation money would not be recoverable and with the object of doing good and benefit to the reversioners to the estate of late Dakshina Mohan Roy .... the said Radhika Mohan Roy and the second party Sindhubala Debi both jointly executed a mortgage bond and agreement dated the 7th Chaitra 1310 B. S. .... As consideration for the said deed Sindhubala Debi promised to pay Radhika Mohan Roy Rs. 50,000 amicably and out of that she

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paid to him Rs. 5,000 in cash and with regard to the balance of Rs. 45,000 she executed a Kistibandi mortgage bond in favour of the said Radhika Mohan Roy. In accordance with the said agreement and the terms of the said deed the aforesaid Radhika Mohan Roy did not appear in the last mentioned probate case which was dismissed on the 22nd of March, 1904. ....

"The late Dakshina Mohan Roy left a heavy amount of debts at the time of his death and after his death the second party Sindhubala Debi has had to contract a loan of a large sum to carry on litigations for the protection and benefit of the estate left by him especially in order to carry on the first mentioned probate case brought by Annada Mohan Roy and Peary Mohan Roy to its last stage and in connection with the carrying out of the last mentioned probate case brought by Radhika Mohan Roy up to its present stage. There is also some money due to the Attorneys, etc. also in connection with the aforesaid two cases and other cases relating to the estate of the late Dakshina Mohan Roy. Loans having been contracted and there having been debts for the protection and benefit of the estate and the amounts of all those loans and debts having been spent for the purposes of and for the benefit of the estate it (the estate) is liable for the said debts and loans and they are binding against the estate.

"I, second party, Sindhubala Debi, am a Hindu widow. To perform religious acts etc. is the principle vow of my life ; especially I am a Pardanashin lady and remain in the inner appartment of the house. I have not sufficient experience and power to manage the properties. Under these circumstances it is very difficult for me to manage and preseive the estate by paying the following viz , the balance of what has been left out of the debts, etc. contracted by my husband after payment of portion thereof...... and all the debts etc. contracted by me for the purposes and requirements of the estate .... and besides the above the dues of the Attorney's etc. also for the period they worked for the estate and other debts of the estate of which the amount could not be ascertained ....

"With regard to the Saham allotted to my share in the partition suit .... by the said Peary Mohan Roy the Sadar revenue thereof so excessive and the collections thereof are so inconvenient and expensive .... it will be very difficult rather impossible for me to preserve the estate ....

"My two daughters viz., the third party Srimaty Tarangini Debi and the 4th party Srimaty Sikharbasini Debi, who will be

heirs to the estate left by my husband after my death, will also obtain the same in life interest only. Even if I relinquish my life interest in their favour and place my husband's estate in their hands there is no chance that they would properly manage the estate of my husband and repay the debts etc. and would protect the estate properly for (the benefit of) their successors who would be entitled to the same in absolute right. I have no son and as far as I know, I have no power to take a son in adoption.

"For the aforesaid reasons I have considered it to be beneficial to me in this life as well as in after life if I and my two daughters, the third and fourth parties cause the absolute right in the estate left by my husband to vest in you from the present time by *jointly conferring upon you whatever right, title and interest we have and may have to the same and by making gift of the same to you and by relinquishing the same in your favour absolutely* and I think that to be necessary.

"We, viz., I, Tarangini Debi, the third party and I, Sikharbasini Debi, the fourth party, have at present no rights of possession and enjoyment in respect of the estate left by our father. We shall have only life interest to the said estate on the death of our mother the second party. We are Purdanashin ladies and inmates of the seraglio. We have no properties of our own. We have no experience whatever about wordly affairs. We have also no desire to enjoy the properties. For all these reasons and under the aforesaid circumstances if the estate remains in the hands of my mother there is no chance of our making any arrangement or rendering any assistance in the matter of protection of the estate and in the works of management and administration etc. thereof and even if the said estate come to our hands it will be difficult for us to manage and protect the said estate. At present you, the first party, are the only reversionary heir to the estate in absolute right alive. *If we jointly and in agreement with our mother the second party confer upon you and relinquish in your favour whatever right, title and interest we have to the said estate,* you being entitled to the same wholly and in absolute right shall be able to protect it. There seems to be no other good arrangement for protection of the estate except the above. *If the estate is ruined, I, the third party shall not have any chance of getting the benefit I have been deriving on the basis of this document, and if any son be born of my womb or if I take a son in adoption then they will have no chance of obtaining the benefit which has been obtained for them on the basis of this document. For all these reasons for the benefit of myself and my future son or adopted*

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son and in order to prevent harm in future, after taking proper consideration under the circumstances, I have thought it proper to cause full and absolute right to accrue to you *by conferring upon you my entire right, title and interest in the said estate and by relinquishing the same in your favour............*

"After careful consideration of all the circumstances of the estate, I have fixed *Rs, 41,111* as mentioned in Schedule Jha, as the *consideration for conferring upon you and relinquishing in your favour whatever right, title and interest I have got to the said estate*, and your father and other well-wishers on your behalf have admitted the said consideration to be adequate. I have no right of enjoyment of the estate before the death of my mother, the second party and the future affairs are uncertain in every way and I shall be entitled to the said consideration money from the very beginning and shall be competent to enjoy the interest in the said money from now without any opposition and loss even from now. If, out of the said consideration money, Rs. 11,111 be set apart for my own use and enjoyment and the balance of Rs. 30,000 be kept in the custody of my husband by making him trustee under a trust deed, the income derived therefrom also having remained in his custody will swell to a big sum and if a son be born to me in future or if I take a son in adoption the said son or adopted son on attaining majority will be entitled to receive the said money from the said trustee and will derive great benefit and profit thereby.

"You the first party, are the only son born of the womb of me, Sikharbasini Debi, fourth party.

"I have regarded it as my duty *to confer upon you and to relinquish in your favour whatever right, title and interest I have got and may get in future* to the estate left by my father *on acceptance of the monthly allowance mentioned in Schedule (Ena).* In accordance therewith I, third party Tarangini Debi and I, fourth party Sikharbasini Debi have decided to join our mother, the second party and to execute this deed of Ekrar surrendering and relinquishing right in your favour.

"*As consideration for the above deeds and the consideration money mentioned therein*, whatever right, title and interest I, the *second party, Sindhubala Debi have or may acquire or which may accrue to me in future* in the self-acquired properties and the personal properties of the late Dakshina Mohan Roy and all sorts of decrees and suits etc. relating to the estate left by the said late Dakshina Mohan Roy and *the accumulated money and all sorts or dues etc. and all sorts of claims etc.* and in the deed of agreement executed by the

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said Radhika Mohan Roy on the 7th Chaitra, 1310 B.S. in the aforesaid manner, and *whatever right, title and interest we* viz., I, the *third party* Tarangini Debi and I, the *fourth party* Sikharbasini Debi have in respect of the properties............and in respect of the decrees and suits etc. relating to the estates left by our father and the *accumulated money and all sorts of dues etc.* and claims etc. and whatever right, title and interest we have and may have and which will accrue to us and be enforceable after the death of *our mother and whatever right, title and interest and possession we have and may acquire in connection with the said estate* on the basis of the agreement dated the 7th Chaitra, 1310 B.S. executed by our paternal uncle Radhika Mohan Roy in favour of our mother the second party, *we jointly and severally confer upon you* by this document subject to the terms thereof hereinafter mentioned and *relinquish* the same in your favour.

"Herein-below are mentioned, item by item, all those terms and conditions under which the property mentioned in this deed are given away to you in relinquishment of right and interest therein on the basis of this deed :—

"(a) You, first party, agree to pay me, second party, Sindhubala Debi Rs. 850 per month as Britti or monthly allowance during my life-time out of the estate left by my husband on account of my religious acts and maintenance. As security for payment of the said Britti or monthly allowance, the property No. 1 out of the properties mentioned in the schedule marked (Kha), which lies within District Noakhali and which is encumbered with the charge of Rs. 45,000, the unpaid money of the agreement dated 7th Chaitra, 1310 B.S. executed by the said Radhika Mohan Roy in favour of myself, is encumbered with that charge. You shall not be competent to transfer the said property by sale etc. by ignoring the said Britti or monthly allowance, that is to say, without being subject to the charge thereof.

"(b) My step-brother Srijukta Babu Ananda Chandra Roy and my full brother Srijukta Nripendra Chandra Roy have laboured hard and made great sacrifice. Especially if Srijukta Babu Ananda Chandra Roy had not rendered pecuniary help continually it would have been impossible for me to support my objection in the said Will case. But for their efforts and care, the estate could not have been preserved so long. Although out of affection for me they did not demand proper remuneration from me yet if I do not make payment to them by way of compensation according to the circumstances of estate and according to my own consideration I shall be

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morally guilty. Therefore I have decided to give them the sum of Rs. 1,20,000 by way of gift as compensation for the above. By this deed the right I had and have to enjoy and appropriate according to my pleasure the income of the estate left by my husband which is now in the hands of the administrator *pendente lite*, and the arrears of rent etc. have been entirely given away to you and with regard to that in consultation with your father Sriman Rames Chandra and your other well-wishers and with the approval and consent of them and the third and fourth parties it has been settled that as consideration for my making wholesale gift of the income and arrears of rent etc. which I am entitled to enjoy according to my pleasure by this deed and for my relinquishing the same in your favour you shall give me Rs. 1,20,000 (one lac twenty thousand rupees) with right to exercise full ownership therein and to use and appropriate the same according to my pleasure and on that condition. Out of the said sum you paid Rs. 10,000 in cash on the 19th Asharh and out of the balance of Rs. 1,10,000, you shall pay to me Rs. 20,000 within two months of the coming of this estate in your own possession from the administrator *pendente lite*. In default interest will run on the said sum of Rs. 20,000 at the rate of 1 per cent. per annum from that date.

"(c) I, third party, Tarangini Debi having made a gift in your favour of the right and interest I have and shall have in future in the estate left by my father and having relinquished the same in your favour, as consideration for the same you have promised to pay me Rs. 41,111. Out of that you paid to me Rs. 5,111 in cash on the 10th Asharh, 1312 B. S. and as regards the balance of Rs. 36,000 you shall pay the same according to the Kistbandi mentioned in the schedule (Jha) and having stipulated to pay interest on the defaulted Kist at the rate of As. 8 per Rs. 100 per month in case you make default in payment of any Kist, you execute an instalment mortgage bond in my favour .... by keeping in mortgage the properties of the schedules marked Ka, Kha, Ga and the properties of the items Nos. 1 and 2 of the schedule marked Gha as security for payment of the aforesaid sum .... I shall get the said sums in absolute right with right to make all kinds of transfer thereof such as gift, sale etc. and with right to possess and enjoy the same down to my sons, grandsons and other heirs and representatives in succession. .... After my death neither you nor any other person shall be entitled to claim the said money as heirs of Dakshina Mohan Roy under any circumstances .... I, third

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party Tarangini Debi have no son. You are at present the sole reversionary heir to the estate left by my father in absolute right. Consequently my mother, the second party and myself, the third party and my full sister, the fourth party all having jointly made a gift of all our right, title and interest in the said estate to you and having relinquished the same in your favour, you become owner thereof in indefeasible and absolute right.

'(d) You, first party shall pay monthly allowance at the rate of Rs. 50 per month to me, third party, Tarangini Debi during my lifetime (after the death of my mother). In default of paying the monthly allowance month after month interest will run on the monthly allowance in arrear at the rate of Re. 1 per cent per month. The liability of this monthly allowance shall become operative after the death of my mother.

"(e) In consideration of my making a gift of and relinquishing in your favour whatever right and interest I, fourth party Sikharbasini, have at present and shall have in future in the estate left by my father, you shall pay to me Rs. 100 per month as Britti or monthly allowance with right to enjoy the same down to my son, grandsons and other heirs in succession, but during the lifetime of my mother the second party Sindhubala Debi, I shall get monthly allowance at the rate of Rs. 50 per month. After the death of my mother you shall pay monthly allowance at full rate of Rs. 100 in the aforesaid manner. .... In case of failure to pay the said two kinds of monthly allowance at the end of one month interest will run on the said monthly allowance in arrear at the rate of Re. 1 per cent per month from the next month."

The contentions of the appellant with regard to Ex. 1 are two-fold:

(1) that the transaction embodied in this deed amounts to surrender by a Hindu widow in favour of the second reversioner with the consent of the first reversioner. Such surrender is valid under Hindu law. The consent of the immediate female reversioner even if purchased for consideration especially when the estate is in danger and cannot be saved except by vesting it in a male reversioner does not vitiate the surrender.

(2) Assuming that the transaction embodied in Ex. 1 can be justified only on the basis of double surrender i. e first surrender by the widow in favour of the daughters and then surrender by the daughters in favour of the daughter's son, the transaction embodied in Ex. 1 binds the actual reversioners.

The first contention can be divided into two parts, viz.,—

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(a) the effect of the consent of the first reversioner on the transaction.

(b) the effect of the payment of consideration for obtaining the consent of the first reversioner on the transaction.

In support of the first part of the contention reliance was placed by the appellants on the following passage in the judgment of this Court in *Protap Chunder Roy Chowdhry* v. *Sreemutty Joy Monee Dabee Chowdhrain* (1).

"We think that it admits of no reasonable doubt that under Hindoo law a Hindu lady in possession can relinquish, and by relinquishing anticipate for the reversioners their period of succession; and if she does this in favour of second reversioners in the present instance with the consent of the first, then or afterwards expressed, the relinquishment is valid, and this, notwithstanding that it may be expressed in a form which, under some circumstances, might be open to question."

In that case, however, the consenting first reversioner was a male and not a female or limited owner as in the case before us.

We were asked by the appellant to extend this rule to the facts of the present case as the rule stated in that case is in general terms.

The first part of the rule is a rule of the Hindu law. By operation of this part the succession of the immediate reversioner is accelerated on the surrender by the widow. This acceleration does not depend upon the consent of the immediate reversioner.

The second part of the rule states the effect of the consent of the immediate male reversioner on his accelerated interest accrued from the operation of the law of surrender by Hindu limited owner.

Where the immediate reversioner is a male the accelerated interest vests in him absolutely and he can deal with it in any way he likes. He may make a gift of his interest. He can transfer it for consideration. If there is no consideration for the consent the consent may imply a gift. If there is consideration for such consent it may be a sale.

Where, however, the immediate reversioner is a female and the accelerated interest is the interest of a limited owner she can only deal with her limited interest. She cannot by her dealing affect the interest of the actual reversioners unless by her consent she

(1) (1864) 1 W. R. 98 (99).

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effaces her own limited interest and thereby accelerates the absolute interest of the second male reversioner.

The second part of the rule in *Protap's* case (1), therefore, cannot be extended to the consent of defendants Nos. 2 and 3 unless their consent amounted to an effacement of their life interest or surrender according to Hindu law as except an alienation for legal necessity I am not aware of any other principle of Hindu law under which a limited owner can accelerate the absolute interest of the second male reversioners and thereby destroy the interest of actual reversioners.

In support of the second part of the first contention reliance was placed by the appellants on the following observations of Sadasiva Ayyar J. in *Chinnaswami Pillai* v. *Appaswami Pillai* (2).

"The act of a daughter who being next heir, in surrenders the whole estate vests the absolute inheritance in the next male heir even if she received consideration of her surrender of the full enjoyment of the property during her lifetime."

These observations, however, must be read along with the facts of that case. In that case the consideration for the surrender by the daughter was maintenance of the daughter and such consideration does not invalidate surrender by a Hindu limited owner under the Hindu law.

The contention of the appellants, however, is that the relinquishment by defendants Nos. 2 and 3 even if it was for consideration other than maintenance cannot invalidate the relinquishment and prevent the destruction of the rights of the actual reversioners as the spirit of the Hindu law is, inasmuch as it is a meritorious act on the part of a Hindu widow to preserve the estate of her husband for the spiritual benefit of her husband and that if the estate is in such danger that it cannot be saved except by vesting it in a male reversioner the consent of the intermediate female reversioners can be purchased for consideration other than their reasonable maintenance.

No authority was cited before us in support of this contention excepting the observations of Sadasiva Ayyar J. quoted above.

Assuming that it is the duty of a Hindu widow to save the estate of her husband the imposition of the burden by Ex. 1 on the estate left by Dakshina already over-burdened with liabilities was not a step leading to the preservation of the estate.

I am, therefore, unable to give effect to the first contention.

(1) (1864) 1 W. R. 98 (99). (2) (1918) I. L. R. 42 Mad. 25 (29).

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The second contention raises two points :

(1) whether the surrender by the widow is valid under Hindu law.

(2) whether the surrender by the daughters is valid under Hindu law.

The basis of the doctrine of surrender by a Hindu widow is the effacement of the widow's interest and not the *ex facie* transfer by which such effacement is brought about. The result merely is that the next heir of her husband steps into the succession in the widow's place. There is no difference between surrender to a daughter and surrender to the nearest male reversioner : ***Vytla Sitanna* v. *Marivada Viranna*** (1). The voluntary self-effacement is sometimes referred to as a surrender, sometimes as a relinquishment or abandonment of her rights. It may be effected by any process having that effect provided that there is a bona fide and total renunciation of the widow's right to hold the property: ***Bhagwat Koer* v. *Dhanukhdhari Prashad Singh*** (2). The surrender cannot be considered bona fide if the arrangement is for dividing the estate with the reversioner : ***Sreemati Radharani Dassya* v. *Sreemati Brindarani*** (3).

Reasonable provision for the maintenance of the widow regard being had to the position in life of her husband and the size of her estate is not an arrangement for dividing the estate with the reversioner : ***Vytla Sitanna* v. *Marivada Viranna*** (4) ; ***Radharani's*** case (3).

While dealing with the question of the payment of Rs. 1,20,000 to the widow by defendant No. 4 in order to enable her to make a gift of this amount to defendants Nos. 10 and 11 the trial Judge has observed :

" The onus was upon the widow and upon the assignees, defendants Nos. 10 and 11, to show that the said amount had accumulated on the date of surrender. No evidence had been adduced to prove that Rs. 1,20,000 was available out of the income of the estate of Dakshina Babu on the date of surrender. The only evidence on this point is the deposition of Nripen Babu who was an interested witness. From the circumstances of the case, it appears to me that Ananda Roy and Nripendra Roy have taken advantage of the helpless condition of their sister Sindhubala and they have

(1) (1934) L. R. 61 I. A. 200 (207-208) ; 59 C. L. J. 354 (358-59).
(2) (1919) L. R. 46 I. A. 259 (270-271); I. L. R. 47 Calc. 466.
(3) (1938) 69 C. L. J. 174 ; 43 C. W. N. 337 P. C.
(4) (1934) L. R. 61 I. A. 200 ; 59 C. L. J. 354.

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taken a good share in the division of Dakshina Babu's properties and that the recitals in the deed of surrender that the gift of Rs. 1,20,000 was made out of the income of Dakshina Babu's estate is not a *bona fide* recital. I hold therefore that the said gift of Rs. 1,20,000 was invalid against plaintiff who seeks a declaration to the same effect."

The contention of the appellants is that the trial Judge was wrong in holding that the onus was upon the widow and the defendants Nos. 10 and 11 to show that Rs. 1,20,000 was available out of the income of the estate on the date of the surrender inasmuch as in the present suit plaintiff wants a declaration that the surrender by the widow was invalid and in such a suit the onus is upon the plaintiff to substantiate the grounds of invalidity of the surrender.

In support of this contention reliance was placed upon certain observation of this Court in *Brojo Kishoree Dassee* v. *Sreenath Bose* (1).

The observations relied upon were made in a suit for a declaration that a certain adoption was invalid.

Plaintiff is admittedly a reversioner of Dakshina. The properties covered by the deed of surrender belonged to Dakshina. The deed of surrender does not state that the amount of accumulations was Rs. 1,20,000 or thereabout. If the actual reversioner brings a suit after the death of the limited owner or owners for possession of the estate of the last full owner and his claim is opposed by persons claiming under alienation by the intermediate limited owners for legal necessity the onus is upon the alienees to prove legal necessity. I do not see any reason why the claim based on surrender by limited owners would stand on a different footing.

In a suit by presumptive reversioners for a declaration that alienations by the intermediate limited owners are not binding on the actual reversioners the onus of proving legal necessity, in my opinion, is also upon the alienees. The suit for a declaration by a presumptive reversioner that surrender by the limited owners is invalid and does not destroy rights of actual reversioners should be governed by the same rule of onus inasmuch as under the Hindu law the intermediate limited owners have only life interest and the estate vests absolutely only in male reversioners. There are certain exceptional circumstances under which the right of the actual reversioners can be destroyed by the intermediate limited owners,

(1) (1868) 9 W. R. 463 (467).

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The person pleading these exceptional circumstances must prove them.

The Subordinate Judge, in my opinion, was right in holding that the onus was upon the widow and the defendants Nos. 10 and 11 to prove that Rs. 1,20,000 or thereabout was the accumulated income from the death of Dakshina up to the date of surrender particularly in view of the fact that this amount was not stated in Exhibit I to be the accumulated income on the date of the surrender.

Peary Mohan instituted a suit in the year 1901 before the death of Dakshina for partition of the estate of Mohini Mohan. Dakshina was appointed receiver of the estate in May, 1901. After his death in June, 1901, no receiver was appointed till March 6, 1902. Thereafter the entire estate was again in the possession of a receiver appointed in the partition suit. This receiver was discharged on November 15, 1905.

On the 19th June, 1901, Radhika started the case for obtaining the probate of the Will alleged to have been executed by Dakshina on May 2, 1901. An administrator *pendente lite* of Dakshina's properties was appointed in the same year. Although the probate case was dismissed on March 22, 1904, the administrator was not discharged till January 8, 1906.

The administrator in the probate case did not get possession of Dakshina's ancestral properties but he used to receive from the receiver in the partition suit monies paid by the latter from the income of Dakshina's share and the income, if any, from the self-acquired properties of Dakshina.

Plaintiff examined defendant No. 1 as a witness on his behalf. In the course of her cross-examination by defendants Nos. 10 and 11 she said :—

Q. Did the said sum of one lac and twenty thousand rupees accumulate in the receiver, out of the income of your husband's estate during the pendency of the case in the High Court?

A. *I have heard that some money did accumulate.*

Q. I put it to you that the sum of Rs. 1,20,000 which Rames said that he would pay to you was in stock in the hands of the receiver out of the income of your husband's estate.

A. *I have heard that some money was in stock.*

From the evidence of plaintiff's witness Kasi Nath Mitter the income from the properties inherited by Dakshina from his father from the time of the death of Dakshina to the date of surrender by his widow would be about Rs. 1,20,000.

Dakshina had certain self-acquired properties. There is no evidence to show how much the administrator *pendente lite* received from those properties during this period.

The evidence of defendant No. 11 is that the arrears of rent in the hands of the administrator were more than Rs. 1,20,000. In his cross-examination he admitted that he did not look into the accounts. He is an interested witness. The trial Judge has disbelieved his evidence and I see no reason to believe him.

The receiver paid about Rs. 70,000 to the administrator *pendente lite* and took about Rs. 5,000 for his salary.

Out of the amount received by the administrator he paid about Rs. 31,200 for the maintenance of defendant No. 1 and Rs. 11,000 towards the payment of Dakshina's debt. Out of this amount he took his commission (Rs, 3,500) also and met the costs of the litigation.

The debts left by Dakshina amounted to about Rs. 1,82,000.

The annual interest on this amount was about Rs. 10,000.

If there had been any substantial surplus accumulations either in the hands of the administrator *pendente lite* or of the receiver further payments towards the satisfaction of the liabilities on Dakshina's estate would have been met.

I therefore agree with the trial Judge that the widow took a very substantial amount from the corpus of the estate, and that the arrangement about the payment of Rs. 1,20,000 was a device to divide the estate with the reversioners.

From the deed of surrender it appears that defendant No. 2 took a monthly allowance of Rs. 50 after the death of the widow and a sum of Rs. 41,111 as consideration for the gift and relinquishment in favour of defendant No. 4 of the right and interest which she had or could have in future in the estate left by Dakshina.

It further appears that defendant No. 3 took a hereditary monthly allowance of Rs. 50 for maintenance during the life time of her mother and of Rs. 100 thereafter.

The Subordinate Judge has found that this arrangement also was a device to divide the estate with the reversioner.

It is not the appellants' case that this arrangement amounted to an alienation by the daughters of their life interest for legal necessity.

The contention of the appellants is that this arrangement was a reasonable provision for the maintenance of the daughters during their lives and consequently the transaction amounted to a surrender of their life interests under the Hindu law.

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The argument in support of this contention is this: The monthly income of the estate was Rs. 30,000. The monthly allowance of Rs. 50 for defendant No. 2 was too small for her maintenance. She was entitled to take more. If Rs. 41,111 be taken as the capitalised value of the balance of her reasonable maintenance, the arrangement for the payment of this amount out of the estate should be considered as a reasonable arrangement for her maintenance during her life. Defendant No. 3 was also entitled to take a reasonable maintenance for her life. A monthly allowance for her life of Rs. 50 during the life-time of defendant No. 1 and of Rs. 100 thereafter for her life would be too small. If she had chosen to take an allowance only for her life, she could have taken a larger amount. If instead of taking a larger amount only for her life defendant No. 3 took smaller hereditary allowance the arrangement should be considered as a reasonable arrangement for her maintenance during her life.

I am unable to accept this contention and my reasons are these :—

(1) The question as to what amount would be a reasonable provision for the maintenance of defendants Nos. 2 and 3 is a question of fact.

(2) This question of fact was not raised in the trial Court and was not even raised in the memorandum of appeal in this Court.

(3) The estate was heavily involved and had to pay a large amount as interest to creditors. Rs. 850 had to be paid to defendant No. 1 monthly for her maintenance. The estate was involved in litigation. The allotments of Dakshina's share were not yet final as an appeal against the allotments made by the trial Judge was pending in this Court. The Sadar revenue payable for the allotments made by the trial Court was excessive and the collections were inconvenient and expensive.

(4) From the materials on the record of the present case it is not possible for me to say that the payment of Rs. 41,111 in cash and of Rs. 50 monthly as allowançe after the death of the widow to defendant No. 2 or a hereditary monthly allowance of Rs. 50 to defendant No. 3 during the life-time of the widow and Rs. 100 thereafter, was a reasonable arrangement for the maintenance of the two daughters for their lives.

For the reasons given above, I hold that the transaction embodied in Exhibit I did not amount to a valid surrender of the life interests of defendants Nos. 1 to 3 under Hindu law and that the

arrangement contained therein was merely a device to divide the estate with defendant No. 4.

The result, therefore, is that this appeal fails and dismissed with costs to the plaintiff-respondent. Hearing fee is assessed at ten Gold Mohurs.

Mukherjea, J. :—I agree with my learned brother, that this appeal should be dismissed.

The facts giving rise to the appeal may be shortly stated as follows :—

One Dakshina Mohan Roy, a Hindu resident of Bhowanipur in the suburbs of Calcutta, who was possessed of considerable properties both moveable and immoveable, died on June 6, 1901, leaving behind him his widow, Sindhubala, who is defendant No. 1 in the suit, and two daughters, namely, Tarangini and Sikharbasini who are defendants Nos. 2 and 3 respectively. Sindhubala succeeded to the properties left by her husband in the limited interest of a Hindu widow.

Soon after Dakshina's death there were two probate proceedings commenced by the brothers of Dakshina in the Original Side of this Court for obtaining probate of two Wills alleged to have been left by the deceased. Radhika, the youngest brother of Dakshina was the propounder of one of these Wills and his application for probate was filed on June 19, 1901. The other Will was propounded by the other two brothers, named Annada and Pyari, and the probate proceeding in respect of the same was started on July 15, 1901. The widow Sindhubala appeared as an objector in both these proceedings. The second probate case which was commenced by Annada and Pyari came up for hearing first and Mr. Justice Sale who heard the case rejected the application for probate and pronounced the Will to be a forgery. This decision is dated February 21, 1902. There was an appeal taken against this judgment which was also dismissed on March 10, 1903. The earlier probate case in which Radhika figured as a propounder ended in a compromise and was eventually dismissed for non-prosecution, the widow agreeing to pay a sum of Rs. 50,000 to Radhika as consideration for inducing him to withdraw from the litigation and renouncing all claims under the Will set up by him.

It may be mentioned here that a step brother and a brother of Sindhubala who were made defendants Nos. 10 and 11 in the suit materially assisted her in contesting this protracted litigation with her husband's brothers and Babu Ananda Chandra Roy the defendant No. 10 who was a leading lawyer of Dacca, and who died after

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the institution of the suit advanced the entire money that was necessary for the purpose of carrying on the litigation. On August 13, 1905, Sindhubala along with her two daughters, Tarangini and Sikharbasini, who were the immediate female reversioners executed a deed, which has been called a *Satyarpan* and *Nadabi Ekrarpatra* and by which she purported to renounce her widow's interest in all the properties left by her husband in favour of defendant No. 4, Kshitish Chandra Acharyya who was her only daughter's son then existing, he being a son of Sikharbasini, the youngest daughter of Dakshina. Kshitish was minor at that time and he was represented in this transaction by his father Rames, who was defendant No. 8 in the suit and who has died since then. Under this document Kshitish was to get the entire estate of Dakshina in absolute right as a full male heir on cessation of the limited interests of the widow and her two daughters subject to certain terms and conditions which may be summarised as follows :—

(1) He was to pay a sum of Rs. 850 a month to Sindhubala, the widow, as her *britti* or maintenance allowance and this payment was made a charge upon certain properties which were described in schedule Kha to the document.

(2) The defendant No. 4 was to pay out of the estate the amount due on a decree made by the High Court on the basis of a promissory note, both against Dakshina and defendant No. 8, the father of defendant No. 4, but for which loan the defendant No. 8 was really liable.

(3) The defendant No. 4 was to pay off the entire amount including interest due on a bond for Rs. 48,845-11-3 pies dated Baisakh 7, 1310 B.S. executed by defendant No. 1 in favour of her step brother the defendant No. 10 for the money that was advanced by the latter to enable the widow to contest the probate proceedings.

(4) The defendant No. 4 was to hand over for the absolute use of the widow a sum of Rs. 1,20,000 and this was to be given by the widow to her two brothers, the defendants Nos. 10 and 11 as a token of love and gratitude for the services they rendered in connection with the litigations with her husband's brothers.

(5) The defendant No. 2, Tarangini, who was the elder daughter of Dakshina was entitled to Rs. 41,111 out of the estate as consideration for joining with her mother in the deed of surrender. She was also to have Rs. 50 a month from after her mother's death, and so long as she would herself live.

(6) The defendant No. 4 was to pay to defendant No. 3 his own

mother a monthly allowance of Rs. 50 so long as Sindhubala would remain alive, and an allowance of Rs. 100 a month after Sindhubala's death which was made hereditary and which would devolve after Sikharbasini's death on her heirs and successors.

(7) The defendant No. 4 was also to pay a sum of Rs. 45,000 odd which was still due to Radhika on account of the compromise entered into between him and the widow.

The plaintiff, who is a son of Sikharbasini and a younger brother of defendant No. 4 and who was born subsequent to the execution of the deed of surrender, brought the suit out of which this appeal arises for a declaration that the document was ineffectual as an act of surrender in creating an absolute estate in defendant No. 4 to the detriment of the reversionary rights of the plaintiff. The ground alleged in the plaint was that it was not a *bona fide* act of renunciation by the widow in favour of the nearest reversioner and the whole scheme was only to divide the properties of Dakshina between defendant No. 4 on the one hand and certain nominees and relations of the widow on the other.

It appears that on August 16, 1918, the defendant No. 8 as guardian of defendant No. 4 executed a mortgage in respect of a large number of properties comprised in the deed of surrender in favour of defendant No. 5 and the predecessor of defendants Nos. 6 and 7 to secure an advance of Rs. 1,60,000. The mortgagee got a mortgage decree on the basis of this as well as another mortgage bond which was executed by defendant No. 8 in respect of his own personal properties. In execution of this decree the mortgaged properties were sold in two instalments and purchased by the mortgagee decree-holders. The sale was held partly in 1930 and partly in February, 1932 and the present suit was commenced by the plaintiffs on May 25, 1932.

Besides the parties already mentioned there were two other persons joined as defendants in the suit. One was the husband of Tarangini who was made defendant No. 9 and the other her son who was made defendant No. 12.

The relief prayed for by the plaintiff was a declaration that the rights of the future reversionary heirs of the late Dakshina Mohan Roy other than the defendant No. 4 to the properties left by Dakshina were not affected by the deed of surrender executed by defendants Nos. 1, 2 and 3 in favour of defendant No. 4 on August 13, 1905 and all subsequent acts done by the defendants on the basis of the said deed were not binding on such reversionary heirs. There was a further prayer for a declaration that the reversionary

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heirs of Dakshina were entitled to get back from defendants Nos. 10 and 11 the sum of Rs 1,20,000 which they obtained from the estate.

The suit was contested by defendants Nos. 5 to 7 who filed one joint written statement and by defendants Nos. 10 and 11 who filed another. The rest of the defendants did not take part in the proceedings though written statements were filed by defendants Nos. 4 and 8.

The contentions raised by defendants Nos. 5 to 7 in substance were that the plaintiff had no *locus standi* to maintain the suit which was not a *bona fide* one and was barred by limitation. It was averred that the surrender made by the widow was a valid and *bona fide* surrender which had the effect of vesting the estate absolutely in defendant No. 4 and it was binding on all the reversionary heirs of Dakshina. These defendants, it was said, had obtained a valid mortgage of the lands described in schedule Ka and acquired a good title to the same by purchase at the mortgage sale.

The defence of defendants Nos. 10 and 11 was that they rendered very great and valuable services both financial and otherwise in connection with the litigations between the widow and her husband's brothers and that the sum of Rs. 1,20,000 which was given to them by the widow was no part of Dakshina's estate, but represented the accumulations of the income of the estate and the outstanding arrears of rent at the date of the surrender and over these monies the widow had absolute power of disposal. They further contended that the bond for Rs. 48,845 was lawfully executed by defendant No. 8 as guardian of defendant No. 4 with the permission of the District Judge and that this debt was a charge upon Dakshina's estate.

The trial Court decided all the issues in favour of the plaintiff and decreed the suit. It was declared that the deed of surrender executed by Sindhubala and her two daughters was not binding on the plaintiff after the death of these three ladies. It was further declared that the gift of Rs. 1,20,000 in favour of defendants Nos. 10 and 11 as well as the mortgage in favour of defendants Nos. 5 to 7 and the sale on the basis thereof were not binding on the plaintiff.

It is against this decree that defendants Nos. 5 to 7 have preferred this appeal. No appeal was filed by defendant No. 11 or the substituted heir of defendant No. 10 but they were made respondents. It is reported to us that the heir of defendant No.

10 settled his dispute with the plaintiff and is not interested any further in this litigation.

Mr. Gupta who appears for the appellants has raised a two-fold contention in support of the appeal. He has contended in the first place that the deed of surrender executed by the widow was a perfectly valid and lawful act which had the effect of vesting the entire estate of Dakshina upon defendant No. 4 and that the Subordinate Judge was wrong in holding that it was a mere device to divide the estate between the reversioner and certain nominees of the widow.

The second point taken is that the plaintiff's suit for a declaratory relief is barred by limitation.

As regards the first point it is not disputed on behalf of the respondents that the deed of surrender comprises the entire estate of Dakshina. It is further conceded that the validity of the deed as an act of surrender is not in any way affected by the provision for payment of a sum of Rs. 850 as a maintenance allowance to the widow or the provisions relating to payment of debts due to defendants Nos. 10 and 11 on the one hand and Radhika Mohan Roy, the youngest brother of Dakshina on the other. It is admitted that the debts are lawful charges on the estate of Dakshina. The validity of the deed of surrender is attacked substantially on two grounds. The first ground is that as defendant No. 4 was not the next heir of her husband, and the immediate reversioners were her two daughters, the estate could not vest absolutely in defendant No. 4, unless the daughters themselves had withdrawn their life estates by a valid act of surrender.

The second ground taken is that it was not a *bona fide* act of self-effacement by the widow, but was a mere device to divide the property between defendant No. 4 on the one hand and the nominees of the widow on the other.

These are really the two matters which require investigation in connection with the first point taken in this appeal.

The doctrine of surrender or relinquishment by the widow of her interest in the husband's estate which has the effect of accelerating the inheritance in favour of the next heir of her husband is now a well-settled doctrine of Hindu Law which has been established by a long series of judicial pronouncements. So far as the Bengal law is concerned its origin is attributed to Jimutbahana's commentary on the well-known text of Katyayana which runs as follows: "Let the childless widow preserving unsullied the bed of her lord and abiding with her venerable

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protector enjoy the property with moderation until her death, and after her let the heirs take it"—Vide Dayabhaga, Chapter XI, Section 1, Para. 59. As was pointed out by Sir Asutosh Mookerjee J. in *Debi Prosad* v. *Golap Bhagat* (1), Jimutabahana while commenting upon this passage observed "that the persons, who would be the next heirs on failure of prior claimants, succeed to the residue of the estate remaining after her use of it upon the demise of the widow in whom the succession had vested, in the same manner as they would have succeeded if the widow's right had never taken effect." The theory of relinquishment as the learned Judge observed "was foreshadowed in this passage by Dayabhaga and in fact "the words used by Jimutabahana", namely, 'if her right ceases or never takes effect' are comprehensive enough to include, not merely the case of the death of the widow, but all cases where her right ceases ; in other words, the reversioners take the estate, not merely when the widow dies but also when her title is extinguished, for instance by renunciation, remarriage or the like."

Though the doctrine has undergone development in recent years, yet its basis remains unaltered, namely that it is the self-effacement by the widow or the withdrawal of her life estate which opens the estate of the deceased husband to his next heirs on that date.

"It must be remembered" so observed their Lordships of the Judicial Committee in *Vytla Sitanna* v. *Marivada Viranna* (2), "that the basis of" the doctrine "is the effacement of the widow's interest, and not the *ex facie* transfer by which such effacement is brought about. The result is merely that the next heir of the husband steps into the succession in the widow's place."

This being the principle underlying the doctrine of surrender no surrender and consequent acceleration of the estate can possibly be made in favour of anybody except the next heir of the husband. By surrendering the estate the widow brings about the same result as would happen in the case of her natural death and the next heir steps into the inheritance as a matter of law without any act of consent or acceptance on his part. The Privy Council has held further in the case mentioned above that the fact that the immediate reversioners are female heirs who take only a limited interest in the property does not make any difference, and a surrender in favour of such limited heirs is equally

(1) (1913) I. L. R. 40 Calc. 721 (771) ; 17 C. L. J. 499 (537) See p. 558, 17 C. L. J.—Rep.

(2) (1934) L. R. 61 I. A. 200 ; 59 C. L. J. 354 (359).

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effective though certainly the interest which they take in the property is not thereby enlarged.

In the present case the immediate reversioners were the two daughters of the widow who joined with the latter in making a surrender in favour of the daughter's son who might be described to be a reversioner of the second degree. The question is whether such a surrender is valid in Hindu Law. Mr. Gupta argues that it is valid provided the immediate reversioners give their consent as they have done in the present case.

The point is not free from doubt, and it was expressly left open by the Judicial Committee in the case of *Narayanswami Ayyar* v. *Rama Ayyar* (1). In support of his contention Mr. Gupta has relied upon certain decisions, to wit *Protap Chunder Roy Chowdhry* v. *Sreemutty Joy Monee Dabee Chowdhrain* (2); *Chinnaswami Pillai* v. *Appaswami Pillai* (3); *Musammat Chito* v. *Jhunnilal* (4); *Anto* v. *Yeshwante* (5); and his contention is that the different High Courts in India have practically concurred in holding that such surrender is permissible in Hindu Law. The cases referred to by him really come under two heads. The first head comprises cases where there is an alienation by the widow in favour of a remoter reversioner or a stranger with the consent of the immediate reversioner who is a male heir or is otherwise capable of taking an absolute interest in the property. The second head relates to cases where the immediate reversioner is a female heir who takes only a limited interest in the property and with her consent the widow surrenders the estate to a reversioner who is remoter in degree. The case of *Protap Chunder Roy Chowdhry* v. *Sreemutty Joy Monee Dabee Chowdhrain* (2) is the earliest of the first type of cases. Here the widow with the consent of her husband's brother Parbati who was the immediate reversioner, made a gift of the entire estate in favour of the four sons of the latter. It was held that the deed of gift vested a complete estate in the donees. The learned Judges expressed themselves very generally when they observed as follows:

"We think that it admits of no reasonable doubt that under Hindoo law a Hindoo lady in possession can relinquish, and by relinquishing anticipate for the reversioners their period of succes-

(1) (1930) L. R. 57 I. A. 305; 52 C. L. J. 442.
(2) (1864) I. W. R. 98
(3) (1918) I. L. R. 42 Mad., 25
(4) [1930] A. I. R. All. 395
(5) [1932] A. I. R. Bom. 430.

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sion; and if she does this in favour of second reversioners in the present instance with the consent of the first, then or afterwards expressed, the relinquishment is valid, and this, notwithstanding that it may be expressed in a form which, under some circumstances, might be open to question."

It may be pointed out that it was not really a case of surrender by the widow in favour of a reversioner of the second degree; it was a gift or alienation to persons who were really in the position of strangers at that time with the consent of the immediate heir. It was held by this Court in a number of cases which were reviewed and confirmed in *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (1), that a widow is entitled to sell or transfer the entire estate without any necessity but with the consent of the next male heir so as to bar the rights of the actual reversioners at the time of her death. This was explained by the Judicial Committee in *Rangasami Gounden* v. *Nachiappa Gounden* (2) as an extension of the principle of surrender. "The surrender once exercised" so observed their Lordships "in favour of the nearest reversioner or reversioners the estate became his or theirs, and it was an obvious extension of the doctrine to hold that inasmuch as he or they were in title to convey to a third party, it came to the same thing if the conveyance was made by the widow with his or their consent. This was decided to be possible by the case of *Nobokishore* (1) already cited. The judgment went upon the principle of surrender, and it might do so for the surrender there was of the whole estate, but it is worthy of notice that the order of reference showed that the alienation was ostensibly on the ground of necessity, so that it might have been supported on the grounds to be mentioned under the second head above set forth".

It will be seen that the Privy Council did not disapprove of the principle that a transfer by the widow with the consent of the reversioner could be treated as equivalent to a renunciation by the widow which vested the estate in the immediate reversioner followed by an alienation by the latter in favour of the alienee. In *Nobokishore's* case (1), it must be remembered, the widow really sold the property to a stranger and presumably received the consideration herself. Sir Richard Garth C. J., entertained considerable doubt as to the propriety of the view which would make a sale of the widow to or with the consent of the reversioners

(1) (1884) I. L. R. 10 Calc. 1102 (F. B.)
(2) (1918) L. R. 46 I. A. 72; I. L. R. 42 Mad. 523; 29 C. L. J. 539 (545).

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stand on the same footing as a real relinquishment by her. But in view of a series of prior decisions of the Court he was constrained to accept that view as correct.

In view of the recent pronouncements of the Judicial Committee that the surrender must be a voluntary and *bona fide* act of self-effacement by the widow and what is to be given up is the whole estate of the husband or the whole less what is necessary for her maintenance, it is extremely doubtful whether a sale by the widow which has the effect of converting her husband's estate into money can be regarded as a surrender at all. It would certainly be an indirect way of getting absolute control over the money into which the husband's estate was converted and could not but be regarded as a dodge either to enlarge her own interest or to divide the estate between herself and the reversioner with whose consent the transfer is effected. This aspect of the question was not considered by the Privy Council probably because the transfer in *Nobokishore's* case (1) was upheld on the ground of legal necessity as well. The principle laid down in *Protap Chunder Roy Chowdhry* v. *Sreemutty Joy Monee Dabee Chowdhrain* (2), was applied by the Bombay High Court in *Anto* v. *Yeshwante* (3). There the widow made a surrender of her husband's estate in favour of the husband of a deceased daughter with the consent of an existing daughter who was the next heir at the time and who according to the Bombay law was entitled to take an absolute interest in the estate. Mr. Justice Baker expressly invoked the authority of *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (1) as explained by the Judicial Committee in *Rangasami Gounden* v. *Nachiappa Gounden* (4).

These decisions are no direct authorities on the present point. They only show that when a transfer is made in favour of a stranger or a remoter reversioner with the consent of the immediate heir it is possible to construe the transaction as a surrender in favour of the consenting reversioner followed by a transfer by him in favour of the alienee.

The other two decisions relied on by Mr. Gupta come under the second head. The first of these viz., *Chinnaswami Pillai* v. *Appaswami Pillai* (5), is a decision of the Madras High Court. Here the

(1) (1884) I. L. R. 10 Calc. 1102 (F. B.)
(2) (1854) 1 W. R. 98.
(3) [1932] A. I. R. Bom. 430.
(4) (1918) L. R. 46 I. A. 72; I. L. R. 42 Mad. 523; 29 C. L. J. 539.
(5) (1918) I. L. R. 42 Mad. 25.

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widow and the only daughter of a deceased Hindu surrendered their interests in the estate of the deceased in favour of the daughter's son, and a deed was executed by them both in which there was a stipulation that the reversioner should maintain them during their life time. On the death of all of them the actual reversioners who happened to be different persons sued to recover the estate from the father of the deceased daughter's son who got the properties by right of inheritance. It was held that the surrender was valid in law and operated to vest the estate in the daughter's son. What was invoked in this case was in substance a fiction of a double surrender. It was held by Sadasiva Ayyar, J. that a surrender by a widow with the consent of the next female heir to the secondary male heir can be treated as a joint surrender by both, and that such a joint surrender might be treated as a surrender by the widow to the next female heir which vests the property in her for a moment and an immediate surrender of the property thus vested in the female heir by the latter to the next male heir, the result being to vest an absolute title in the secondary male heir. In this case the daughter actually joined with her mother in executing the deed of surrender but the same principle was held applicable to a case where the immediate female heir instead of joining in the deed of surrender simply expressed her consent to it by signing it as an attesting witness: vide *Musammat Chito* v. *Jhunnilal* (1).

In my opinion the principle formulated by the Madras High Court is the only conceivable principle, upon which a widow can be held competent to surrender the estate in favour of the secondary male reversioner with the consent of the immediate female heirs. In a way it can be said to be a logical extension of the doctrine of surrender. If the immediate reversioner who consents to the alienation by the widow is a male heir we can conceive of an antecedent surrender by the widow in his favour which entitles him to deal with the property in any way he likes by way of a sale or gift. If, however, the immediate reversioner is a female heir, the presumed surrender in her favour by the widow does not enlarge her interest and the next male heir can get an absolute estate only on the footing of another surrender by the immediate female reversioner unless there is legal necessity to support the transaction.

I am inclined to hold that a widow can, with the consent of her daughter who is the next heir of her husband, relinquish the estate in favour of the daughter's son. But the consent given by her must

(1) [1930] A. I. R. All. 395.

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show an intention to efface her own interest completely and circumstances must be such as would entitle the Court to construe the transaction as amounting, in substance, to a relinquishment by the widow in favour of her daughter and a second surrender by the latter in favour of the next male heir. I think, therefore, that if the daughter who joins with the mother in the act of surrender reserves for herself as a consideration for the same a substantial part of the property which she is also presumed to surrender, or stipulates for any benefit to her save and except what is necessary for her maintenance, the transaction might amount to a transfer of her own life interest for consideration, but that could not give the reversioner in whose favour the surrender is made an absolute interest in the estate to the prejudice of the actual reversioner at the time of her death.

I cannot accept the contention of Mr. Gupta that we cannot and need not look beyond the fact that the daughter has given consent to the surrender and it is immaterial as to whether her consent were procured by paying her a large sum of money. Mere consent might operate as a personal estoppel against the consenting daughter or any other person claiming through her, but it cannot bind the actual reversioner. There is a passage indeed in *Chinnaswami Pillai* v. *Appaswami Pillai* (1) where Sadasiva Ayyar, J. observes that the act of a daughter who being next reversioner surrenders the whole estate, vests the absolute inheritance in the next male heir, even if she received consideration for her surrender of the full enjoyment of the property during her life time. But as the facts of the case show the only consideration there, was a provision for maintenance of the daughter and nothing else.

In the case before us the two daughters of Dakshina joined with the widow in executing the deed of surrender and they purported to confer upon defendant No. 4 and relinquish in his favour whatever right, title and interest they had in the estate. It was also recited that the daughters had no desire to enjoy the property. So far as Tarangini was concerned the consideration that she received for relinquishing her rights was Rs. 41,111 as described in Schedule Jha to the document. Out of this Rs. 11,111 was set apart for her own use and enjoyment and the balance of Rs. 30,000 was to be kept in the custody of her husband and suitably invested for the benefit of any son that might be born to her in future.

(1) (1918) I. L. R. 42 Mad. 25.

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"If the estate is ruined" so runs the deed "I, the third party, shall not have any chance of getting the benefit I have been deriving on the basis of this document, and if any son be born of my womb or if I take a son in adoption, then they will have no chance of obtaining the benefit which has been obtained for them on the basis of this document. For all these reasons for the benefit of myself and my future son or adopted son and in order to prevent harm in future after taking proper consideration under the circumstances, I have thought it proper to cause full and absolute right to accrue to you by conferring upon you my entire right, title and interest * * * I have fixed Rs. 41,111 as the considertion for conferring upon you and relinquishing in your favour whatever right, title and interest I have got to the said estate, and your father and other well-wishers on your behalf have admitted the said consideration to be adequate."

Paragraph 10 of the deed provides further that a monthly allowance of Rs. 50 would be paid to Tarangini for her life after the death of Sindhubala.

No exception can possibly be taken to the stipulation in the deed relating to the payment of a monthly allowance of Rs. 50. But the question is whether the acceptance of a consideration of Rs. 41,111 is consistent with the deed being construed as an act of surrender on her part.

Mr. Gupta argues that having regard to the extent of the properties left by Dakshina a sum of Rs. 41,111 would be quite a reasonable and modest amount which could be paid to her in lieu of maintenance. It is said that the maintenance need not be provided in the shape of a periodical pecuniary allowance and there is nothing in law which prevents the surrendering female heir from taking a portion of the immoveable property or a lump sum at once for purposes of maintenance provided it is not unreasonable. This as a proposition in law need not be disputed. In *Sureshwar Misser* v. *Maheshrani Misrani* (1), the widow was given a small portion of immoveable property which she was to enjoy for her life. In *Vytla Sitanna* v. *Marivada Viranna* (2) she reserved six acres out of her husband's estate for her own maintenance and surrendered the rest. In *Angamuthu Chetti* v. *Varatharajulu Chetti* (3), there were two widows, and the reversioner in whose favour the surrender was made gave a personal undertaking to

(1) (1920) I. R. 47 I. A., 233.

(2) (1934) L. R. 61 I. A. 200; 59 C. L. J. 354.

(3) (1919) I. L. R. 42 Mad. 854 (F. B.).

maintain one of them and paid a sum of Rs. 500 to the other. In all these cases the provisions were held to be quite consistent with a *bona fide* surrender.

In the present case a difficulty arises by reason of the fact that this question was not raised in this shape before the Subordinate Judge and we have no materials before us to decide as to whether Rs. 41,111 would be a reasonable sum to be paid to one of the daughters by way of a maintenance allowance. The estate is indeed large, but there are very heavy liabilities upon it, and the document itself shows that Tarangini herself was doubtful as to whether there would be any thing left of her father's estate after the death of her mother. It was a prudent course she adopted to accept a lump sum and avoid all uncertainties regarding the future.

But quite apart from this, the very recitals in the deed would, in my opinion, go to show that this sum of Rs. 41,111 was not taken by Tarangini as provision for her maintenance. It was expressly stated in the document that a sum of Rs. 11,111 was to be taken by her for her own personal use and the balance was to remain with her husband who was to invest it for the benefit of her future children. To me it seems that the receipt of this sum of money by Tarangini was not compatible with the idea of effacing herself completely and letting the estate go down to the next heir. It was really a sale of her interest for a consideration which she deemed to be adequate under the circumstances of this case.

So far as the other daughter, Sikharbasini, is concerned, no objection has been taken to the stipulation to pay her a monthly sum by way of maintenance. What is objected to is the provision which makes the allowance hereditary. In my opinion this objection is quite justified. A surrendering female heir can always reserve for herself a right to be maintained out of the estate which she surrenders, but the maintenance can be enjoyed by her only during her lifetime. It would be against the spirit of the doctrine of surrender if the widow would stipulate for a maintenance allowance not only to be paid to her during her life time, but which would be payable for ever to her heirs and successors. My conclusion is that although the two daughters undoubtedly gave their consent to the vesting of the entire estate in defendant No. 4 yet that consent was not an indication of a voluntary self-effacement on their part and the transaction cannot be upheld on the footing of a surrender.

I am not impressed with the argument of Mr. Gupta that it

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was justifiable in the circumstances of the present case to secure the consent of the daughters even by paying them money consideration, inasmuch as it was an act of religious merit on the part of the widow to protect her husband's estate and there was no other way of protecting the same except by vesting it in a male heir. Protection of the husband's estate, is, I think, no relevant matter for consideration in determining the validity of a surrender by the widow. Whatever be the motives that actuate her, it is always open to the widow to efface herself and put an end to her legal existence. The estate then automatically vests in the next heir; and unless the next heir chooses to pass it on to some other person, in some manner recognised by law the widow cannot arrogate to herself the right of making a sort of testamentary disposition, and direct that the property should go not to the immediate heir but to some other person who might be more competent to manage the same. Further it is difficult to believe that the estate could not be protected except by relinquishing it in favour of defendant No. 4. The widow was certainly a Purdanashin lady having no experience in Zemindary affairs, and it is expressly recited in the deed, that Dakshina had incurred considerable debts during his life-time and the properties which were allotted in his share on partition, were inconveniently situated and bore very heavy revenues. But an infant of 5 years, as the defendant No. 4 was, at that time, would hardly be a proper person to be entrusted with the duties of management. It was really the father of defendant No. 4 upon whom the widow relied, but the services of Romes were available to her even if she kept the estate in herself or renounced it in favour of the daughters. A full owner certainly could secure loans more easily than a limited owner, but the full owner, in this case being a minor had also similar disabilites to encounter.

Assuming now for the sake of argument, that the widow was competent to surrender the estate in favour of her daughter's son, with the consent of the two daughters who were the immediate heirs, and it was immaterial that the latter received consideration for giving their consent, it is necessary to enquire whether the act of the widow herself constituted a valid surrender according to Hindu law, that is to say was a bona fide act of self-effacement on her part, and not a mere device to divide the estate of her husband between the reversioner and her own nominees.

The answer to this question depends on the propriety or

otherwise of the provision in the deed of surrender under which the reversioner bound himself to hand over to the widow a sum of Rs. 1,20,000 and which latter wanted to make a gift of, to her own brothers the defendants Nos. 10 and 11.

As has been said at the beginning, Babus Ananda chandra Roy and Nripendra Chandra Roy, the two brothers of Sindhubala, assisted her a good deal, in connection with the litigation she had with her husband's brothers. In fact, but for the financial help which she received from Ananda Babu, it would have been impossible for her to contest the litigation. Ananda Babu had advanced a sum of Rs. 48,845 for litigation expenses and it is not disputed that he was entitled to recover this sum from the estate left by Dakshina Mohan.

In the deed of surrender, the defendant No. 4 not only undertook to pay this amount for which a bond was already executed by the widow, but he took the further liability of paying a sum of Rs. 1,20,000 to the lady, which the latter wanted to hand over to her two brothers out of affection and gratitude for the services they had rendered. For this money the estate of Dakshina was not liable, and if this was to come out of the estate surrendered by the widow, she would admittedly have a large slice out of her husband's estate in absolute right for the benefit of her own relations. Mr. Gupta has frankly conceded that if this money was to be paid out of the corpus of the estate left by Dakhina, the surrender would not be valid in law. He contends, however, that the money represented the accumulations out of the income of the estate which were in the hands of the administrator *pendente lite* and the outstanding arrears of rent realisable from the tenants, and these the widow could dispose of absolutely at her discretion. It is necessary to examine the evidence on this point carefully; for, it cannot be disputed as a matter of law, that the widow had full powers over the income of her husband's estate and gifts of the accumulated income, unless she had already chosen to treat it a as part of the corpus, could not affect the validity of surrender.

By the deed of surrender the accumulated income, and outstanding arrears of rent, were given to defendant No. 4 along with the corpus of the estate. Paragraph 5 of the deed recited as follows: "By this deed, the right I had and have to enjoy and appropriate according to my pleasure the income of the estate left by my husband which is now in the hands of the administrator *pendente lite* and the arrears of rent etc. have been entirely given away to you and with regard to that in consultation with your

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father Sriman Rames Chandra and your other well-wishers and with the approval and consent of them and the third and fourth parties it has been settled that as consideration of my making wholesale gift of the income and arrears of rent to which I am entitled to enjoy according to my pleasure, by the deed and for my relinquishing the same in your favour you shall give me Rs. 1,20,000 with right to exercise full ownership therein, and to use and appropriate the same according to my pleasure and on that condition."

In substance the lady sold the accumulated income in the hands of the Administrator and the arrears of rent to the reversioner for a consideration of Rs. 1,20,000. If the evidence makes probable, that an amount near about Rs. 1,20,000 was really due to the lady as arrears of rent, or accumulated income in the hands of the Administrator *pendente lite* at the time of the surrender the bargain would be quite a fair one, and as this was no part of the husband's estate which she was surrendering, the retention of this benefit would not be inconsistent with the withdrawal of her life-estate. Mr. Gupta argues that the burden is upon the plaintiff to show that the recital in the deed is not true and that the accumulated income did not amount to Rs. 1,20,000 at the date of surrender. I do not think that this contention is sound. The document does not mention what amount there was in the hands of the administrator, and it does not specify the extent of the arrears of rent that had accrued due at that time. The plaintiff moreover was no party to the deed and is not bound by its recitals. A Hindu widow has only restricted powers of alienation with regard to the properties she inherited from her husband and it is only under exceptional circumstances, that she can confer an absolute title on others. Any person therefore who asserts that he has acquired an absolute title to such property, on the basis of an act of surrender or alienation by the widow must make out the circumstances which would make such act valid and binding on the actual reversioner.

It appears from the evidence, that Peary Mohan Roy, one of the brothers of Dakshina instituted a suit for partition against his three brothers, in the Court of the Sub-Judge, 24 Parganas, in respect of their joint estate, during the lifetime of Dakshina. Dakshina who was defendant No. 1 in that suit was appointed a receiver by an order of the Court dated 23rd May, 1901, and soon after he died. The plaintiff Peary remained for sometime after that, in charge of the joint estate, and later on a receiver

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was appointed, and the estate of the four brothers remained in the hands of the receiver till November, 1905. In the meantime two Probate suits having been instituted in the Original Side of this Court, by the brothers of Dakshina with regard to Dakshina's share of the estate, an administrator *pendente lite* was appointed by this Court in respect of that share. As the properties of Dakshina were still undivided, the administrator *pendente lite* used to recover the income in respect of Dakshina's share from the receiver or other person who was in charge of the entire joint estate.

Mr. Gupta lays very great stress on the evidence of Kasinath Maitra, a witness for the plaintiff, who says that the income from Dakshina's share of the joint estate was Rs. 30,000 a year. To this Mr. Gupta says another sum of Rs. 8,000 must be added which represented the income of Tripura Sundari the mother, in the one-fourth share of Dakshina, and which after Tripura Sundari's death would devolve upon Sindhubala and also the income from the self-acquired properties of Dakshina. The estate of Dakshina was in the hands of the administrator *pendente lite* for nearly 4 years, and during this period he paid to Sindhubala only a maintenance allowance of Rs. 650 a month. It was quite probable therefore, Mr. Gupta argues, that the savings out of the income would come up to Rs. 1,20,000. I do not think that I can accept this contention as sound. In the first place, Mr. Gupta is wrong in taking into account the sum of Rs. 8,000 which was given to Tripura Sundari. It would certainly go to Sindhubala after Tripura's death, but Tripura died after the deed of surrender was drawn up and just before it was executed. No portion of Tripura's income did therefore come into the hands of Sindhubala during the four years after her husband's death. Dakshina admittedly had some self acquired properties, but we have absolutely no evidence as to the income derived from them. If we take the income of Dakshina's estate to be Rs. 30,000 a year, the accumulations and outstanding would amount to Rs. 1,20,000 in four years, only and only if nothing was spent out of it during all this time. As a matter of fact, the widow was paid over Rs. 31,000 as her maintenance during this period, the charges of the Receiver in the Alipur Court were met, and so also the allowances and office expenses of the Administrator *pendente lite* in the High Court. It is admitted in the deed of surrender itself that Dakshina had incurred large debts, and from the materials we possess it would appear, that they amounted to about one lakh and eighty two thousand rupees. The interest that was due

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on these debts, and which ought to have been met from the income of the estate, was more than Rs. 10,000 a year. It appears further that the Administrator *pendente lite* met a liability on Dakshina's estate to the extent of Rs. 11,500. Taking these figures broadly it would seem to me that even if we add something on account of the self-acquired properties of Dakshina, the saving from the income at the date of the surrender could not be more than a small fraction of Rs. 1,20,000. But I have great doubts, as to whether the income of the joint estate really amounted to Rs. 30,000 a year. From the order-sheet in the partition suit, we find, that the Administrator *pendente lite*, who represented the estate of Dakshina, was paid about Rs. 70,000 in all out of the joint estate during this period, and if we accept that figure as correct, there would be practically nothing left as surplus out of the income of the estate, which the widow could dispose of at her pleasure. There is no evidence to show, that as a matter of fact the defendant No. 4 or his guardian got any amount, as accumulated income, when the estate was released by the Administrator. If any substantial amount really came out of that source it is difficult to see, why defendant No. 4 could not make any payment in cash and had to execute bonds in favour of all the persons to whom money was payable under the terms of the deed of surrender.

I think that the finding of the Court below on this point is correct. There was little or no money in the hands of the Administrator and the outstandings if any were also insignificant. It was under the guidance of Babu Ananda Chandra Roy who was himself an experienced lawyer, that the deed of surrender was drawn up. He and his brother were the persons largely benefited by the deed, and I think that this untrue recital was made in the document only to make out a plausible justification in law for the widow's giving such a large sum of money to her own brothers. In my opinion as this money was really a part of the estate left by Dakshina, the surrender by the widow was not a valid surrender in law.

The only other question that remains for consideration is the question of limitation. Both sides have accepted the position that the present suit is governed by article 120 and not article 125, Limitation Act. The position seems to be correct, as the plaintiff in this suit is not the immediate reversioner who could succeed, if the widow were to die at the time when the suit was brought. Here the immediate reversioners were parties to the alienation

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by the widow, and consequently precluded themselves from bringing a suit for having it declared to be improper. The remote reversioner therefore was competent to maintain a suit for a declaratory relief under section 42 of the Specific Relief Act vide *Abinash Chandra Mazumdar* v. *Harinath Shaha* (1). As the Act makes no express provision for such cases, the suit must necessarily be referred to article 120, under which it should be instituted within 6 years from the date when the right to sue accrued. The right to sue would accrue ordinarily as soon as the alienation is made, but as in this case the plaintiff was not born when the widow executed the deed, his right to sue could not come into existence before the date of his birth, *Das Ram Chaudhury* v. *Tirtha Nath Das* (2). The plaintiff would get exemption for the entire period that he was a minor, and would have to institute the suit within 3 years after the attainment of majority as provided by section 8 of the Limitation Act.

The plaintiff's case is that he was born in 1911 and attained majority in 1929, and the suit being filed within 3 years from that date is not barred by limitation. No horoscope or birth certificate has been produced, but the plaintiff has examined two witnesses in support of his case. The first is Biswanath Dhar, who at the time of the plaintiff's birth was in the service of his father. He swears that the plaintiff was born in 1318 B. S. at that time Khitish the elder brother was about 11 or 12 years old. It was not disputed that Khitish was born in 1900. The other witness Peary Mohan Das is also an old employee of Rames the father of the plaintiff and he also says that the plaintiff was born when he was in the service of his father. He says however that he makes the statement on guess. As against this the contesting defendants have produced extracts from the Admission Register of a Public School at Dacca, where the plaintiff is said to have prosecuted his studies and also a transfer certificate signed by the head master of the same institution. If these certficates are to be believed, the year of birth of the plaintiff would be 1908 and not 1911. The School Registers are undoubtedly admissible in evidence, but the Sub-Judge I think rightly refused to attach much value to the same. It is not clear on whose statement the age was recorded, and the register mentions the name of one Nagendra Lall Chowdhury as guardian of the plaintiff though there is no evidence to show who the gentleman was, and whether

(1) (1904) I. L. R. 32 Calc. 62.
(2) (1923) I. L. R. 51 Calc. 101.

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the plaintiff ever lived under his guardianship. Mr. Gupta refers in this connection to the evidence of Sindhubala who says that the difference between the age of Khitish and that of the plaintiff would be 3 or 4 years but that is manifestly incorrect, as the plaintiff was admittedly not born when the deed of surrender was executed. Though the evidence adduced by the plaintiff as regards his age is not very satisfactory, I am unable to say that the trial Judge who had the opportunity of seeing the two witnesses was not justified in believing them. In my opinion the decision of the Court below on this point must be affirmed. In the view that I have taken, it is not necessary to consider whether a fresh right to sue accrued to the plaintiff on the sale of the properties in execution of the mortgage decree obtianed by defendants Nos. 5-7.

The result is that the appeal fails and must be dismissed with costs.

A. T. M. *Appeal dismissed.*

Before Mr. Justice Syed Nasim Ali and *Mr. Justice B. K. Mukherjea.*

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JUGAL CHARAN MONDAL AND OTHERS

v.

RAI DEBENDRA NATH BALLAV BAHADUR AND OTHERS.*

Jurisdiction—Civil Court—Suit for assessment of rent—Purchaser in revenue sale—Land declared to be an invalid Lakheraj—Revenue-free Lands (Non-Badshahi grants) (Regulation XIX of 1793), section 9—Statute, creating right or liability—Performance—Land Revenue Assessment (Resumed Lands) (Regulation II of 1819), section 30—Bengal Land-Revenue Resumption Act (VII B. C. of 1862), section 2—Damages for use and occupation.

* Letters Patent Appeal No. 13 of 1938 against the decision of Mr. Justice R. E. Jack, dated the 7th July, 1938, in Appeal from Appellate Decree No. 1914 of 1936, against the decree of Sites Chandra Sen, Esq., Subordinate Judge, 1st Court, of 24-Perganas, dated the 31st August, 1936, affirming that of Rabindra Kumar Basu, Esq., Munsif, 2nd Court, Alipur, dated the 21st February, 1936.

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The disputed lands in respect of which the plaintiffs sought assessment of fair and equitable rent are included in a Chak appertaining to Touzis Nos. 2 and 16. Touzi No. 2 has an undivided 13 as. 10 gds. and odd share in all the lands of the Chak while Touzi No. 16 has the balance of 2 as. 9 gds. and odd share. This Chak said to comprise an area of 200 standard Bighas, was claimed as Lakheraj by the holders thereof at the time of the Permanent Settlement, and as such it was not assessed with revenue in 1793. In 1839 the Government started resumption proceedings with regard to these lands under Regulation II of 1819, when it was found that there were valid and proper Lakheraj grants covering an area of 133 Bighas, while the rest namley 67 Bighas was Mal land liable to be assessed to revenue. As the area of this Mal land was less than 100 Bighas, the Government did not proceed further and it was left to the Zemindars to take such steps as they thought proper. The Zemindars were no other persons than the Lakherajdars themselves, who were content to enjoy these lands as part of the estate. Touzi No. 2 was sold for arrears of Government revenue on January 24, 1909 and purchased by the present plaintiffs. In 1927 the plaintiffs instituted a suit for recovery of the lands of the Chak to the extent of 13 as. and odd share. The suit was decreed but on second appeal it was held that the plaintiffs' suit for *khas* possession would fail inasmuch as the defendants being the descendants of the holders of an invalid Lakheraj were protected from eviction, but it was held at the same time that with the exception of 133 Bighas to which the defendants showed a valid Lakheraj title, the plaintiffs would be entitled to get fair rent assessed with regard to the remaining lands of the Chak. After this decision, and in pursuance of the directions contained in the judgment, the present suit was instituted, the plaintiffs claiming to have assessment of rent on all the lands of the Chak outside the 133 Pighas and also damages for use and occupation on the basis of such rent for a period of 3 years prior to the institution of the suit, namely from 1339 to 1341 B. S. The defence was that they were holding the lands in assertion of their Lakheraj rights as a part of the independent Lakheraj estate which was formed out of 133 Bighas of land ever since the time of the Permanent Settlement :

Held, that on the facts and circumstances of the present case section 9 of Regulation XIX of 1793 had no application there being no evidence of any grant nor any pretence of such grant prior to 1790, and hence the plaintiffs were not bound to follow the procedure laid down in section 9 of the said Regulation. The Civil Court and not the Collector could thus assess fair rent.

That if the defendants were really the holders of an invalid Lakheraj under a grant prior to 1790 and the right of proprietors to the revenue of such lands was based upon section 6 of Regulation XIX of 1793, the plaintiffs could have the revenue assessed only in the manner contemplated by section 9 of the said Regulation.

Semble: Suits to which section 2 of Act VII B. C. of 1862 relates, are resumption suits strictly so called and the only question for determination by the Court is whether the lands are or are not liable to be assessed to revenue.

Section 9 of Regulation XIX of 1793 makes separate provisions for resumption and assessment of different kinds of invalid grants, and its provisions are left

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intact by subsequent Regulations. Actual fixing of revenue has all along been left to the revenue authorities.

When a statute creates a right or obligation and enforces its performance in any particular manner, then ordinarily the performance cannot be had in any other manner.

Section 5 of Regulation XIX of 1793 does not warrant the conclusion that the assessment of rent must be made on the basis of actual produce of the lands in suit at the date of the Permanent Settlement. The material time is when the lands are actually resumed and held liable to be assessed to revenue; in this case from the date of decision of the High Court in the previous suit.

As the plaintiffs had no right to claim rents before the settlement of rent, they are not entitled to damages for use and occupation prior to institution of suit.

Appeal by the Defendants.

The suit was for assessment of rent and damages for 3 years prior to institution of suit. The suit was decreed and on second appeal the following judgment was delivered by

1938. *July, 7.*

Jack, J. :—This appeal has arisen out of a suit for assessment of rent and for recovery of damages for use and occupation of the lands described in the plaint for the years 1339 to 1341. The lands include 13 annas 10 gandas and 3 karas share of the holding of Chak Sarmasta, forming estate No. 2 as described in the plaint. The plaintiff auction-purchased estate No. 2 at a revenue sale and on his suit for khas possession it was decreed that he was entitled not to khas possession but to fair rent for all the lands included in estate No. 2 except 133 Bighas in which the defendants' rent-free title was recognised. In execution of that decree the defendants selected in lieu of their 133 Bighas certain settlement plots and the present suit is for the assessment of fair and equitable rent on the balance and for recovery of damages for use and occupation of the lands for three years. The rent has been fixed by the Court below at Rs. 143-12 a year and it was directed that the plaintiff would get Rs. 431-4 as compensation for use and occupation of the lands for the previous three years.

In this appeal it is contended, in the first place, that it is only the Collector who has jurisdiction in the matter of assessment of lands left unsettled at the time of the decennial settlement and that the Court has no jurisdiction to entertain such a suit in the present case. This matter has been fully discussed by the Courts below and I agree entirely with the decisions arrived at by them. The matter is settled by the enactment of Act VII of 1862 in which it was provided that all suits referred to in Section 30 of

Regulation 2 of 1819 should be preferred and disposed of exclusively in the ordinary Courts of the Civil jurisdiction, without reference to the Collector. I agree with the Courts below in holding that the present suit is a suit of the nature referred to in Act VII of 1862 and therefore the Civil Court had jurisdiction to entertain the suit.

The next point urged is that the Court of appeal below was wrong in assessing rent on the basis of present assets. It should have held that the proper interpretation of the decree of this Court would be to assess fair and equitable rent, according to the assets existing at about 1793, when the liability to assessment was first incurred or at least in the forties of the last century, when the liability was first ascertained. It appears to me to be quite clear that the meaning of the direction of this Court that fair and equitable rent was to be assessed is that fair and equitable rent was to be assessed under the present conditions. What would have been fair and equitable rent at that time could not easily be ascertained, but it is said that in the course of resumption proceedings the Court actually assessed the annual rental at one rupee per Bigha and held that in the circumstances the landlords were entitled to recover rent at eight annas per Bigha and that this should, therefore, be considered fair and equitable rent. It is true that under Regulation 19 of 1793, rent is to be assessed under Section 8 at one half of the annual produce of the land calculated according to the rents at which other lands of similar description in the pargana may be assessed and that, of course, refers to the existing local rates of rent. Had there been in the present case, a direction from the High Court that the plaintiff was entitled to fair and equitable rent according to the conditions existing in 1793, it would have been the duty of the Court to try to assess the rent accordingly. Interpreting as I do the order of this Court to mean fair and equitable rent under present conditions, I think the Court below was right in trying to ascertain what would be a fair and equitable rent under present conditions, merely adhering to the principles laid down in Section 8 of the Regulation as regards the manner of assessment of rent. It would be impossible to take the present rental at eight annas per Bigha because there is no evidence on the record as to what would be the present value of the eight annas rental which the Court assessed at the time. It appears to me therefore that the Courts below were quite right in the method in which they calculated fair and equitable rent. They have followed the method laid down in Regulation 19

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modified by the principles for calculating rent laid down in the Bengal Tenancy Act.

The next point raised was that the Court of appeal below should have held on the facts found that at the time of the resumption the entire area of the Chak was taken to be 200 Bighas only and 133 Bighas having been released as valid Lakheraj, at most the remaining quantity of 67 Bighas could be assessed and that the plaintiff was precluded by the Regulation from seeking to have a quantity of more than 100 Bighas assessed to rent, inasmuch as in that contingency such right of assessment belonged exclusively to the Government. The direction of the Court in the previous suit was that as the total area was reckoned at 200 Bighas, after the exclusion of 133 Bighas Lakheraj, the plaintiff was entitled to rent on the rest of the area which was taken to be 67 Bighas. At the recent cadastral survey the total area of all the lands included in Chak Sarmasta was found to be 106·27 acres equivalent to about 318·8 Bighas and therefore after deducting 133 Bighas from this the remainder would be very much more than 67 Bighas. The defendants in execution of the decree of this Court selected certain cadastral survey plots amounting to 49 64· acres as their 133 Bighas Lakheraj, and the Courts below found that 40 acres represent the plaintiff's 13½ annas share of the lands of Chak Sarmasta remaining after this selection. The principle on which the rent of these 40 acres was assessed was by taking the total gross rental received by the tenants and allowing 10% for collection charges and 10% for failure of realization and allowing the landlord half of the balance as the rental. Out of the 40 acres, 3 acres were Shivottar and Pirottar lands and the rent of this land was assessed at one rupee inasmuch as the defendants got no rent for these lands. Of the remaining 37 acres of land the gross proportionate rental according to the Record of Rights was Rs. 381 and therefore deducting 10% from this for collection charges and 10% for failure of realisation the fair and equitable rent for the 13½ annas share of the lands belonging to the defendants was reckoned at Rs. 143-12.

The argument of the defendants is that the balance being more than 100 Bighas, under section 7 of Regulation 19 of 1793, the revenue on the lands belongs to Government and land so adjudged liable for payment of revenue is to be considered as an independent Taluk. Inasmuch as in this case the remaining land was found to be less than 100 Bighas the matter was regulated by section 6 of the Regulation. It seems to me clear therefore that the

pargana measurement in this case must have been at 22 inches per cubit which was in general the old pargana measurement and that therefore the original area of 200 Bighas amounted to nearly 300 Bighas of the present standard. This is borne out also by the present measurement according to which the area was found to be 318·8 Bighas. I think therefore that in the order of this Court as regards the deduction of 133 Bighas as Lakheraj and the assessment of rent on the balance, the Bighas referred to must have been Bighas according to the old measurement, namely, 22 inches per cubit. Reckoning in this way, the plaintiff is entitled to rent of 318·8 Bighas less 198·7 Bighas (corresponding to 133 Bighas of the old measurement). The balance amounts to 120 Bighas and this is exactly the area which has been, in fact, assessed to rent, namely, 40 acres. I think therefore there is no substance in the objection of the defendants that the plaintiff was precluded by the Regulation from seeking to have a quantity of more than 100 Bighas assessed to rent. The area which was actually assessed to rent was not more than 100 Bighas according to the old measurement.

A further objection on behalf of the appellants is that the Court below erred in applying the principle of section 7 of the Bengal Tenancy Act in making the present assessment. As I have already said I think that the Courts were justified in order to ascertain what would be fair and equitable rent under the present conditions in applying the principles of section 7 of the Bengal Tenancy Act and taking into account also the princples laid down in the original Regulation 19 of 1793.

Another objection is that the Court of appeal below erred in holding that the defendants Nos. 1 to 3 were liable to pay damages for use and occupation. The plaintiff on the decree of this Court was entitled to rent of these lands from the date of the decree. The plaintiff is therefore entitled to the amount included in the plaint which is really rent although he referred to it as damages for use and occupation.

There appears to have been an error in the calculation made by the lower appellate Court. The gross rental, leaving out the Pirottar lands is Rs. 354 ; deducting 20% from this the balance is Rs. 283/8/ ; half of this is Rs. 141/12/ and adding Re. 1 rental for the Pirottar lands, the total is Rs. 142/12/ instead of Rs. 143/12/, and the total arrear of rent due is Rs. 428/4/ instead of Rs. 431/4/.

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With this modification, this appeal is dismissed. I pass no order as to costs in the circumstances of the case.

Leave to appeal under section 15 of the Letters Patent asked for is granted.

Against this decision, an appeal was preferred under section 15 of the Letters Patent.

Messrs. Atul Chandra Gupta, Gopendra Chandra Das and *Jyotirindra Nath Das* for the Appellants.

Dr. S. C. Basak, Messrs. Rama Prosad Mookerjee and *Bijan Behari Das Gupta* for the Respondents.

C. A. V.

The judgments of the Court were as follows:

August 9.

Mukherjea, J.:—This appeal is one under section 15 of the Letters Patent and is directed against a judgment of Mr. Justice Jack dated the 7th of July, 1938, passed in Appeal from Appellate Decree No. 1914 of 1936. The appellants before us are the defendants in a suit commenced by the plaintiffs respondents for assessment of fair rent in respect of the lands described in the schedule to the plaint and for recovery of damages for use and occupation of the same for the years 1339 to 1341 B. S. The facts so far as they are material for our present purposes may be narrated as follows: The disputed lands in respect of which the plaintiffs seek assessment of rent are included in a chak known as Chak Sarmasta appertaining to two Touzies, namely Touzis Nos. 2 and 16 of the 24-Parganas Collectorate. Touzi No. 2 has an undivided 13 annas 10 gandas and odd share in all the lands of the chak while Touzi No. 16 has the balance of 2 annas 9 gandas and odd share. This Chak, which is said to comprise an area of 200 standard Bighas, was claimed as Lakheraj by the holders thereof at the time of the Parmanent Settlement and as such it was not assessed to revenue in 1793. In 1839 the Government started resumption proceedings with regard to these lands under Regulation II of 1819, and in 1841 the Collector passed orders directing the resumption of the entire Chak. There was an appeal against this order to the Commissioner who found that there were valid and proper Lakheraj grants covering an area of 133 Bighas of land while the rest were *mal* lands liable to be assessed to revenue. As the area of the lands with regard to which the Lakherajdars failed to make out any valid title was less than 100 Bighas, the Government, it appears, did not proceed further in the matter and it was left to the Zemindars to take such steps as they thought proper. The Zemindars were no

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other persons than the Lakherajdars themselves and, as naturally could be expected in these circumstances, they remained entirely inactive and were contented to enjoy these lands as part of their estate. Of the two Touzis to which the lands appertained, Touzi No. 2 was sold for arrears of Government revenue on January 24, 1909 and it was purchased by the present plaintiffs. In 1927 the plaintiffs instituted a suit for recovery of possession of the lands of the Chak to the extent of their 13 annas and odd gandas share. This suit was decreed by the Courts below and a Second Appeal was taken to this Court by the defendants which was numbered Appeal from Appellate Decree No. 1849 of 1929. The learned Judges (Pearson and Jack, JJ.) who heard the appeal allowed it in part and held that the plaintiffs' suit for khas possession would fail inasmuch as the defendants being the descendants of the holders of an invalid Lakheraj were protected from eviction, but it was held at the same time that with the exception of 133 Bighas to which the defendants showed a valid Lakheraj title, the plaintiffs would be entitled to get fair rent assessed with regard to the remaining lands of the Chak. After this decision, and in pursuance of the directions contained in the judgment, the present suit was instituted by the plaintiffs and they claim to have assessment of rent on all the lands of the Chak outside the 133 Bighas and also damages for use and occupation on the basis of such rent for a period of three years prior to the suit.

The trial Court decreed the plaintiffs' suit in part. The rent was assessed and fixed at Rs. 150 per annum with effect from the beginning of the year 1342 B. S. The claim for damages was disallowed. On appeal to the lower appellate Court this decision was modified in some respects. The rent assessed was reduced to Rs. 143/12 as. a year, but the plaintiffs were allowed compensation for use and occupation at that rate for a period of three years prior to the suit. Then there was a Second Appeal taken to this Court by the defendants and Mr. Justice Jack who heard the appeal affirmed the decision of the lower appellate Court with slight alterations which were necessary by reason of certain errors in the calculations. It is against the decision of Mr. Justice Jack that the present appeal has been preferred under section 15 of the Letters Patent.

Mr. Gupta who appears for the appellants has raised three points before us in support of the appeal. He has contended in the first

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place that the present suit for assessment of rent commenced by the plaintiffs, is not maintainable in a Civil Court and it is the Collector and Collector alone who can assess revenue or rent under the provisions of Section 9 of Regulation XIX of 1793. The second ground taken is that even if the Civil Court had jurisdiction to try the suit, rents could not be assessed in accordance with the provisions contained in section 7 of the Bengal Tenancy Act.

The assessment, it is said, must be made on the basis of the actual produce of the lands in suit at the date of the Permanent Settlement or, at any rate, at the date when the first resumption proceedings were started by Government. The last point urged is that in any view of the case the Courts below should not have given the plaintiffs a decree for damages on the basis of rents assessed, for any period antecedent to the date of the suit. I will take up these points one after another.

On the first point Mr. Gupta's argument in substance is, that the right of the Zemindars to have revenue or rent assessed in respect of lands held under an invalid Lakheraj grant was created by section 6 of Regulation XIX of 1793. It was the Government who assigned over to the Zemindars the right which it itself had to the revenue of such lands. The Regulation in section 9 laid down the procedure which was to be followed by the Zemindars in getting revenue assessed in such cases, and the remedy provided by section 9 must in these circumstances be held to be exclusive. It is no doubt a well settled principle that when a statute creates a right or obligation and enforces its performance in any particular manner, then ordinarily the performance could not be had in any other manner. In *Wolverhampton New Waterworks Co.* v. *Hawkesford* (1) Willes J. referred to three classes of cases in which a liability founded upon a statute might be sought to be enforced. The three classes were stated as follows :

"One is where there was a liability existing at common law and that liability is affirmed by statute which gives a special and peculiar form of remedy different from the remedy which existed at common law : there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is where the

(1) (1859) 6 C. B. (N. S) 336.

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statute gives the right to sue merely but provides no particular form of remedy: there the party can only proceed by action at common law. But there is a third class namely where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it." With respect to that class it was held that the party must adopt the form of remedy given by the statute. This decision was approved of by the Judicial Committee in *Attorney-General of Trinidad and Tobago* v. *Gordon Grant Co.* (1) and still later in the *Secretary of State* v. *Mask & Co.* (2).

If the defendants in the present case are really the holders of an invalid Lakheraj under a grant prior to 1790 and the right of proprietors to the revenue of such lands is based upon section 6 of Regulation XIX of 1793, it seems to me to be fairly clear that the plaintiffs can have the revenue assessed only in the manner contemplated by section 9 of the Regulation. Dr. Basak who appears for the respondents seeks to repel this contention in two ways: He argues first of all, that section 9 of Regulation XIX of 1793 provided only an alternative remedy of a summary character and the general jurisdiction of Civil Courts was not taken away. In the second place he has argued that the procedure laid down in section 9 was altered by section 30 of Regulation II of 1819 which again was replaced by section 2 of Bengal Act VII of 1862 and under the Act of 1862 a Civil Court is quite competent to entertain a suit of this character.

As regards the first point it is pointed out that the remedy provided by Section 9 of Regulation XIX of 1793 is imperfect for more reasons than one. The revenue has to be fixed by the Collector on a report made to him by the Zemindars and that has to be confirmed by the Board of Revenue. The Lakherajdar would occupy the position of a dependent Talukdar and enjoy the property from generation to generation only if he agreed to pay that revenue. Nothing is said as to what would happen if the grantee of an invalid Lakheraj tenure refused to pay the settled revenue. It may be, that this is a defect in the framing of the section or it may be that the framers of the Regulation thought that the ordinary rule under which the estate of a recusant proprietor was settled with farmers or outsiders would also apply in this case. But even if it is conceded that the right of the grantee of

(1) [1935] App. Cas. 532.
(2) (1940) 71 C. L. J. 576; 44 C. W. N. 709.

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an invalid tenure to dispute the revenue assessed upon his property by the Collector or the Revenue Authorities can be decided in the ordinary Civil Courts, that is of no assistance to the plaintiffs, for no such contingency has arisen in the present case and no revenue has been fixed by the Collector or the Board of Revenue to which exception has been taken by the defendants.

The other point raised by Dr. Basak was indeed accepted by Mr. Justice Jack in this Court and it was held by the learned Judge that a Civil Court would have jurisdiction to entertain a suit for assessment of rent under Section 2 of the Bengal Act VII of 1862. Mr. Gupta contends that Section 2 of Act VII of 1862 as well as Section 30 of Regulation II of 1819 relate to proceedings for resumption, pure and simple, where the only matter to be considered and determined by the Court is, as to whether the lands are liable to be assessed to revenue or not. They do not contemplate proceedings for assessment proper and actual fixing of the revenue has all along been left to the Revenue Authorities. The provisions of Section 9 of Regulation XIX of 1793 were, therefore, left intact by subsequent Regulations. It seems to me that this contention is sound. A distinction between resumption and assessment is made in Regulation XIX of 1793 itself and whereas the liability to pay revenue had to be determined by the Civil Court under Sections 11 and 12 of the Regulation, the actual assessment was to be done by the Collector under Sections 8 and 9 of the same. The procedure for resumption was certainly altered to some extent by Regulation II of 1819. Sections 5 to 29 of this Regulation were taken up with the procedure to be adopted by Government where resumption of its own revenue was concerned. Section 30 made provisions for private proprietor in regard to lands which they could resume. This section declared that "all suits preferred in a Court of judicature by proprietors, farmers or Talukdars to the revenue of any land held free of assessment * * * * shall immediately on the institution be referred for investigation to the Collector or other officer exercising the powers of the Collector provided also that proprietors, farmers or Talukdars who may deem themselves entitled to the revenue of any land held free of assessment in their respective estates shall be at liberty to prefer the claims in the first instance to the Collector." The section described in details the procedure that had to be followed and in case where reference was made by a Court of judicature the Collector was to transmit the papers together with his own opinion to the Judge who was to decide the matter finally.

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A suit by a proprietor against the grantee of a Lakheraj tenure, if the grant was before 1790 and the area did not exceed 100 Bighas, would certainly come within the purview of Section 30 of Regulation II of 1819; but the detailed provisions of this section do not show that the final order contemplated by this proceeding related to anything more than determination of the question of liability to assessment. The dual system, which was sanctioned by Regulation II of 1819, it seems, was found to be inconvenient; hence the section itself was repealed by Bengal Act VII of 1862 which by Section 2 provided as follows: "All suits preferred by proprietors, farmers, or talookdars, to resume the revenue of any land held free of assessment, as well as all suits preferred by individuals claiming to hold land exempt from the payment of revenue, shall be instituted, heard and determined in and by the Courts of Civil Judicature, like ordinary civil suits." Here, again, I am inclined to think that suits to which this section relates are resumption suits strictly so called and the only question for determination by the Court is whether the lands are or are not liable to be assessed to revenue.

But though I do not agree with Dr. Basak that the procedure laid down in section 9 of Regulation XIX of 1793 was altered by subsequent enactments, I am of the opinion that on the facts and circumstances of the present case section 9 of Regulation XIX of 1793 has no application. Regulation XIX of 1793 makes separate provisions for resumption and assessment of different kinds of invalid grants. When the grant is prior to 1st December, 1790 and the area exceeds 100 Bighas the revenue is declared to belong to the Government and section 8 lays down the procedure to be followed in assessing such lands to revenue. If the grant is prior to 1790 but the area does not exceed 100 Bighas, the revenue is given to the private proprietor within the ambit of whose estate the lands are situated and he can have the revenue assessed on such lands by following the procedure laid down in section 9. Lastly, if the grant is made after 1790 it is declared to be null and void and the proprietor was empowered by section 10 of the Regulation to dispossess the grantee and to recover rent at the Pargana rate without taking any judicial proceeding whatsoever. So far as the lands in suit are concerned, the defendants have not been able to establish grant of any kind either before or after 1790. The resumption proceedings show that there was a valid grant with regard to 133 Bighas of land, and the rest was not covered by any grant at all. Neither in the present suit nor in the earlier one did

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the defendants take up the position that they were dependent talukdars under the provisions of sections 6 and 9 of Regulation XIX of 1793. On the other hand, their express defence throughout was that they were holding the lands in assertion of their Lakheraj rights as a part of the independent Lakheraj estate which was formed out of 133 Bighas of land ever since the time of the Permanent Settlement or, at any rate, since 1840 when the resumption proceedings were started. The Court of appeal below had, therefore, no justifiction to hold that there was a grant prior to 1178 B. S. simply because there was no evidence on either side to show that there was any grant of later date. If there is no evidence of any grant in this case prior to 1790, and I do not think that there is any,—nor even a claim to hold the lands on the pretence of such grant prior to 1790—I do not think that the plaintiffs are bound to follow the procedure laid down in section 9 of Regulation XIX of 1793.

It is contended by Mr. Gupta that it is no longer open to the plaintiffs to take up this position after the final decision of this Court in the previous suit between the parties. As stated already, the previous suit was started by the present plaintiffs for recovery of possession of these lands on establishment of their title as revenue sale purchasers. The plaintiffs' case was that the lands were a part of the *mal* estate. The defence taken by the defendants was that they had acquired a good title to the lands by open assertion of Lakheraj title ever since the time of the Permanent Settlement. Both the Courts below decreed the plaintiffs' suit. A second appeal which was taken to this Court was heard by Pearson and Jack JJ. and the material portion of the judgment which was delivered by Mr. Justice Jack runs as follows: "Finally, it is urged that in any case the plaintiffs can only claim rent from the defendants for the lands of the Chak to which their proprietary right is established. It is clear from the provisions of Sections 4 and 6 of Regulation XIX of 1793 and section 3 of Regulation II of 1819 that there was no intention in the resumption proceedings to dispossess the holders of invalid Lakheraj but rather to assess them to revenue where the land exceeded 100 Bighas or to rent under the proprietors of the estates within whose boundaries they were included where the area is less than 100 Bighas as in this case. In so far, therefore, as the contesting defendants are the successors of the original holders of the invalid Lakheraj which was resumed, they are entitled to continue to hold the lands as tenants of the proprietors of the estate to which

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they belong." In the decree that followed the plaintiffs were given an express declaration of their title as proprietors and they were held entitled to have fair rents assessed in respect of these lands. Nowhere in his judgment did the learned Judge find clearly that the defendants were grantees of Lakheraj tenure prior to 1790 and, in fact, no such case was attempted to be made on behalf of the defendants either in the pleadings or in the evidence. What the learned Judges seem to base their decision upon was the supposed policy of the resumption proceedings as laid down in sections 4 to 6 of Regulation XIX of 1793 and section 3 of Regulation II of 1819 and in that view it was held that the defendants were protected from eviction but were bound to pay rents. It was not said that the plaintiffs would have the revenue assessed on the lands in the manner laid down in section 9 of Regulation XIX of 1793; on the other hand, their proprietary title on the basis of their purchase at a revenue sale was declared and they were held entitled to fair rents from the defendants as tenants. In my opinion, it is difficult to say that this judgment declared the position of the defendants to be that of grantees under an invalid Lakheraj grant prior to 1790, but even if it is held that as this was the assumption upon which the decision was based it could not be disputed now, I think that the defendants likewise are bound by the other part of the decision which declared their liability to be assessed to rent as tenants of the plaintiffs whose proprietary right to these lands was declared. If Mr. Gupta's contention is right and the judgment of the previous suit is taken to have finally settled the rights of the parties irrespective of what they would be according to the strict interpretation of law, I think that the plaintiffs would be clearly entitled to claim assessment of rent in a civil suit as is obviously contemplated by the aforesaid judgment and the defendants would be precluded from raising the plea in bar under section 9 of Regulation XIX of 1793. It may be pointed out that the plea as to want of jurisdiction was not taken by the defendants in their written statement in the present suit though the point was argued at the time of hearing. In my opinion, the first contention of Mr. Gupta must fail.

The next question raised by Mr. Gupta relates to the propriety of the way in which rent has been essessed in the present case. It may be conceded that section 7 of the Bengal Tenancy Act has no application here. But even if we attempt to assess rents on the same principle upon which revenue has got to

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be assessed under Regulation XIX of 1793, I do not think that the defendants can be said to have any grievance. The Courts below have assessed the rent at the rate of Re. 1/5 a Bigha. According to sections 8 and 9 of Regulation XIX of 1793 even if the grant was presumed to be prior to 1179 B. S., the revenue was to be half of the actual produce. The actual produce at the present day cannot be less than Rs. 3 a Bigha and I do not think, therefore, that the basis of assessment is in any way wrong. We cannot accept Mr. Gupta's contention that we must look to the value of the produce at the time of the Permanent Settlement. This is not warranted by section 5 of Regulation XIX. The material time I think is when the lands are actually resumed and held liable to be assessed to revenue. This could not be earlier than the decision of this Court in the previous suit between the parties. This contention, therefore, must also be overruled.

The last point raised by Mr. Gupta should, in our opinion, succeed. The plaintiff had no right to claim rents unless the rents were actually settled. We, therefore, dismiss the claim of the plaintiff for recovery of damages for use and occupation for a period of three years prior to the institution of the suit. We direct that the rent assessed by the Court below which is fixed in perpetuity, would be operative from the commencement of the Bengali year 1345 B. S.

Subject to these modifications, we affirm the decision of Mr. Justice Jack and dismiss this Letters Patent appeal. No order as to costs of this Court.

Nasim Ali, J. :—I agree with the judgment just now delivered by my learned brother.

The defendants' case in the written statement is that they are holding the disputed land as Lakheraj since the time of the Permanent Settlement. They are, therefore, on their own case, not entitled to the rights and privileges of the dependent talukdars.

A. T. M.

L. P. A. dismissed: Decree varied.

PRIVY COUNCIL.

PRESENT : *Lord Thankerton, Sir George Rankin and Mr. M. R. Jayakar.*

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[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT PATNA.]

Declaratory suit—Burden of proof—Evidence Act (I of 1872), Secs. 106, 112—Meternity in dispute—Dispute as to rival titles—Principles governing ejectment suits—Mutation proceedings, nature of—Version of event spreading over several successive stages—Appellate Court—Demeanour of witness.

The provisions of section 106 of the Indian Evidence Act require that as the facts relating to the pregnancy of the mother and of the son's birth are within her knowledge, the burden lies on her to prove them.

Section 112 of the Indian Evidence Act has no application where the maternity of a person is in dispute and not his paternity.

Where the dispute substantially relates to two rival titles, the principles governing ejectment suits are not applicable and even if it were proved that the defendant was technically in possession for a few months under a paper entry, that fact would furnish very little indication of the superiority of his title over his opponent.

Mutation proceedings are merely in the nature of fiscal inquiries, instituted in the interest of the State for the purpose of ascertaining which of the several claimants for the occupation of the property may be put into occupation of it with the greater confidence that the revenue for it will be paid.

Nirman Singh v. *Lala Rudra Partab* (1) referred to.

When dealing with a version spread over several consecutive stages, careful regard should be had to them all and their truth or falsehood tested on a review of the entire case. The incidents have to be judged in the light of what preceded and followed; and it would be an error to segregate the incidents and test their veracity in isolation.

In the circumstances of the case it was for the defence to prove beyond all reasonable doubt that the appellant was the son of the last owner. It was not incumbent on the respondents to disprove the appellant's case and their failure to support their own theory does not prove the truth of his.

Where the Judges of the appellate Court had the advantage, which the trial Judge had not, of seeing the demeanour of a witness, it is difficult to reject their appreciation, except upon grounds which clearly prove that their view was wrong.

(1) (1926) L. R. 53 I. A. 220 (227); 44 C. L. J. 330 (337).

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Privy Council Appeal No. 33 of 1937, by Defendant No. 9 against the judgment and decree of the High Court of Patna (Courtney Terrel C. J. and Dhavale, J. Agarwala J. dissenting), dated the 2nd March, 1936, reversing those of the Additional Subordinate Judge of Palamau, dated the 17th March, 1933, which decreed the suit of plaintiffs respondents Nos. 1 to 7 for recovery of possession of an impartible estate.

The material facts appear from the judgment of their Lordships.

T. P. Eddy K. C. and *M. H. Rashid* for the Appellant.

J. M. Pringle for the Respondents.

Their Lordships' judgment was delivered by

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Mr. Jayakar : This is an appeal from the judgment and decree of the High Court of Judicature at Patna dated 2nd March 1936, which reversed the judgment and decree of the Additional Subordinate Judge of Palamau dated 17th March, 1933, and decreed the suit of the plaintiffs respondents 1-7 for recovery of possession of an impartible estate called Deogan estate, in succession to the last holder Surendra Bux Rai (hereinafter called Surendra).

The suit was instituted on 8th March, 1924, by the plaintiff (respondent 1) claiming a declaration that the property in the suit, being an ancestral impartible estate of the joint family of Surendra and himself, devolved on him by survivorship, on the death of Surendra and that plaintiff 1 was alone the rightful owner thereof under the Mitakshara law and by virtue of the customs of primogeniture and female exclusion, which governed the estate. He also asked for possession.

Plaintiffs 2-7 were subsequently brought on the record, as assignees under a permanent lease obtained from plaintiff 1, in consideration of amounts lent for financing the litigation.

The defendants were :—1, Binodini Devi, the widow of Surendra (shortly described as the Dulhin); 2, Mr. Coutts, the manager of the estate appointed under the Chota Nagpur Encumbered Estates Act; 3-8, the members, near and remote, of the said joint family; 9, Nand Kishwar (appallant before the Board), who claimed to be the posthumous son of Surendra born of defendant 1, and 10, Sham Sunder Kuer, the daughter of Surendra, born of defendant 1.

It is to be noted that the mother of Surendra, shortly described

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as the Rajmata, was not a party to the proceedings. Certain issues were raised, out of which, the only one which now survives for the consideration of the Board is issue No. 4, viz., whether defendant 1 gave birth to defendant 9 as alleged by the defence. On this issue, the trial Court held in the affirmative. The High Court has differed, Courtney Terrell C. J. and Dhavale J. holding in the negative and Agarwala J. in the affirmative.

From this decision an appeal has been preferred to His Majesty in Council.

It has been found that the Deogan estate, though impartible, is the property of the joint Hindu family, of which Surendra and respondent 1 were members, that it is an impartible jagir governed by the rule of primogeniture under the Mitakshara law and that respondent 1 would be entitled to succeed by survivorship to the estate, unless the appellant proved that he was the son of Surendra. The findings on these issues are no more in controversy.

The appellant's counsel argued at the outset that the burden of proving that the appellant was not the son of Surendra lay upon the plaintiff (respondent 1). Reliance was placed on the pleadings and certain sections of the Indian Evidence Act. It was urged that as the plaintiff was suing for possession from the appellant who was in possession at the date of the suit, the suit was in the nature of an ejectment action and section 110 of the Indian Evidence Act applied. Sections 101 and 112 of that Act were also relied upon. The last section, however, can have no application to the facts of this case, where the maternity of the appellant is in dispute and not his paternity. It was further argued that as the plaintiff made in the plaint charges of fraud, it is for him to prove them. The simple answer to these arguments is first, that it has not been satisfactorily proved that at the date of the suit, 8th March, 1934, the appellant was in possession of the property. It is enough to refer in this connection to the clear admission of the Dulhin, the appellant's mother and guardian *ad litem*, made in her objections to the appointment of a receiver dated 20th September, 1925, that the estate was released from the management of the encumbered and wards estate office in April, 1924, which would be after the date of the suit. The entry relied upon by the defendant in the extract from the survey register confirms this view. It shows that the name of the Dulhin, the mother and guardian *ad litem* of the appellant, was entered as proprietor of the estate in the year 1924-5 and as the official year would commence on 1st April and the number of the entry is 568 suggesting

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its lateness in the year, it is clear beyond doubt that, at the date of the suit, neither the appellant nor his mother on his behalf was in possession of the property.

Apart from this, which is a complete answer to the appellant's contention, it is hardly possible to apply to this case, where the dispute substantially relates to two rival titles, the principles governing ejectment suits and even if it were proved that the appellant was technically in possession for a few months under a paper entry, that fact, in their Lordships' opinion, would furnish very little indication of the superiority of his title over his opponent's. As has been frequently held by this Board, mutation proceedings are merely in the nature of fiscal inquiries, instituted in the interest of the State for the purpose of ascertaining which of the several claimants for the occupation of the property may be put into occupation of it with the greater confidence that the revenue for it will be paid.* The provisions of section 106 of the Indian Evidence Act likewise require that as the facts relating to the pregnancy of the Dulhin and of the appellant's birth are within her knowledge, the burden lay on her to prove them. As for the fraud alleged in the plaint, it is irrelevant to the plaintiff's claim, which is based on his undeniable relationship to the last holder of the estate. Their Lordships are therefore of the view that it lay upon the appellant to prove his case beyond all reasonable doubt.

Turning to the High Court's judgments it does not appear that the case was decided on the ground of onus. As the learned Chief Justice observed, the question of onus of proof was of no great importance, because both sides had entered into evidence. There are likewise enough indications in the judgments of the other two Judges to show that the facts proved by the evidence and the probabilities of the case formed largely the basis of their decision.

The material facts of the case are as follows: On 7th April, 1922, Surendra, the last holder of the Deogan estate, committed suicide at his residence at Nawa. He was then 22 years old. He had become infatuated with a mistress, whom he was keeping in his house. In answer to the protests raised against such conduct, he killed first the mistress and then himself. He left a widow, the Dulhin, defendant No. 1, and a daughter aged 2, who was defendant 10 (respondent 8). He also left a mother, the Rajmata.

* *Nirman Singh v, Lala Rudra Partab* (1926) L. R. 53, I. A. 220, 227 ; 44 C. L. J. 330 (337).

At the time of his death the Deogan estate was in the charge of a manager Mr. Coutts, appointed under the Chota Nagpur Encumbered Estates Act (Act No. 6 of 1876). Owing to this fact, it was necessary for the authorities to decide the question of succession. This involved an immediate inquiry as to whether the Dulhin was pregnant. The Deputy Commissioner Mr. Elmes and Mr. Coutts came to Nawa on the day after the death. They were then informed both by the Rajmata and the Dulhin that the latter was pregnant. Previous to this, they had sent a boy called Mona Bux, son of defendant 4, to inquire and report and it is alleged on behalf of the appellant that both the Rajmata and the Dulhin informed the boy that the latter was pregnant. Mona Bux is said to have reported the fact to the authorities. Petitions were subsequently presented to the authorities on behalf of the first respondent denying the pregnancy. A medical examination of the Dulhin was suggested. The Dulhin and the Rajmata did not agree to such examination, on the ground, it is said, that if held in Nawa or nearabout, it would, they feared, affect the prestige of the family. Rabindra Deo, a cousin of the Dulhin, was sent by the Dulhin's mother—Dilraj Kumari—to see her on the death of her husband and, it is alleged, that, on that ground and also because she was pregnant, to take her if possible to her mother's house in the Bamra State of Orissa. On this becoming known, more insistent pressure was brought to bear on the Rajmata and the Dulhin to consent to the latter's medical examination. As before, they refused to agree but ultimately consented to such examination being held at Gaya in the course of the Dulhin's journey to her mother's residence. Thereafter commences the story of an interesting itinerary, which, for the purpose of considering the evidence, may be divided, as the lower courts have done, into incidents occurring at five successive stages as follows :—

(1) Incidents prior to and shortly after the death of Surendra.
(2) Those at Gaya.
(3) At Bamra,
(4) At Calcutta.
(5) Post-Calcutta incidents.

(1) AT NAWA.

The appellant's evidence about incidents which happened at Nawa before and shortly after the death of Surendra is briefly as follows :—

The Rajmata says that about a month before the death of Surendra, she learned from the Dulhin that she was pregnant and

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communicated the information to the Dulhin's mother. During this period, two ladies related to the family, Sampat Raj Kuer and Ganesh Kuer, paid visits, both before and after the death of Surendra; there was no surreptitious concealment of the news about the Dulhin's pregnancy; she gave the information at the earliest opportunity to the authorities who made inquiries into the matter. The appellant's evidence principally consists of the testimony of the Rajmata and of the two ladies Sampat Raj Kuer and Ganesh Kuer. The Dulhin has not given evidence in the case. Sampat Kuer says that she paid a condolence visit to Nawa five or six days after the death of Surendra, when she made inquiries of the Dulhin and found from her answers and the nausea she was having that she was pregnant; she visited again in July-August and observed that she was pregnant. Ganesh Kuer's evidence is much to the same effect. She paid three visits, the first, sometime in Fagun (13th February-13th March), when both the Rajmata and Dulhin said that the latter was pregnant. She thereafter paid two visits, one after Surendra's death, when she saw that the Dulhin was having nausea and was told that she was pregnant. During her third visit in May-June, she saw herself that the Dulhin bore signs of pregnancy. The Trial Judge has very strongly relied upon the evidence of the two ladies. He had the advantage of hearing their evidence given and of observing their demeanour, which the High Court had not. They were distantly related to both the plaintiffs' and defendants' side and are not interested in dishonestly supporting the defendants' side against the plaintiffs—a taint which may attach in a large measure to the Rajmata's evidence. Their Lordships feel compelled to observe that if matters had stood there and the issue had not been clouded by many suspicious acts and omissions disclosed at the later stages of this case as hereinafter stated, they would have found considerable difficulty in rejecting this evidence, so strongly relied on by the Trial Judge. In the present case, however, it is difficult to judge of the truth or falsehood of the evidence in compartments, as the Trial Court appears to have done. When dealing with a version spread over several consecutive stages, it is inevitable that careful regard should be had to them all and their truth or falsehood tested on a review of the entire case. The incidents have to be judged in the light of what preceded and followed; and it would be an error to segregate the incidents and test their veracity in isolation.

The concurrent judgments of the High Court have rejected

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this evidence primarily on the ground that it would be impossible, even for the Dulhin and the Rajmata, to discover the pregnancy at such an early stage, The learned Chief Justice has strongly relied upon the circumstance that, taking the 8th of December, 1922 as the date of birth and the fact that the birth was normal (as disclosed by the evidence) it would be difficult to accept the possibility that, at any stage prior to 7th April, there would be any signs by which either the Rajmata or the Dulhin could have detected the pregnancy. The difficulty of accepting this view is that the witnesses gave evidence many years after the incident. They were ladies of advanced age untrained to accurate observation or memory of time and dates and it is more than probable that in giving definite dates or periods, they exaggerated their impressions or made mistakes. It is undoubtedly correct that, taking the rule of 280 days as the period of normal gestation, the insemination took place on or about 3rd March. Their Lordships' attention was invited to medical treatises to show that, in the case of sensitive persons, nausea appears as the result of pregnancy shortly after conception, though ordinarily it occurs after two months and never after four months. It is not, therefore, absolutely impossible that the Dulhin or the Rajmata, who was apparently experienced in such matters, may have discovered the earliest signs of pregnancy. There is no evidence as to when the Dulhin's last period was passed. If it was shortly after the insemination and three weeks had passed after such disappearance it was not difficult for a shrewd and experienced lady like the Rajmata to suspect the pregnancy, and, in the honest belief that it was so, she gave currency to the news. One point, however, which weakens the defendant's case is the omission to produce the letter by which the Rajmata says she communicated the happy news to Dilraj Kumari the Dulhin's mother about a month before Surendra's death. There is likewise a noticeable discrepancy on this point between the evidence of the Rajmata and of Dilraj Kumari. On the other hand, the plaintiff's evidence relating to this period is not at all helpful. It is practically worthless. The plaintiff No. 1 knows nothing about this matter nor does defendant 4, who is the soul of this litigation on the plaintiff's side. Plaintiff 1 relies upon the information of his wife, who is not examined in this case, although her name was mentioned amongst the witnesses to be called on the plaintiff's behalf. Defendant 4 similarly relies upon the information of his wife and aunt, who have not been examined. It is proved that the two families were living in two

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different compartments of the same house and the ladies upon whom the plaintiff relies must have had excellent opportunities of observing the Dulhin during this period. They have not ventured to give evidence. Another witness was examined, a maid servant, Thakuri Kaharin, who says, from her observation, that the Dulhin was not pregnant. Gopal Ojha, who claims to be the Guru of the family testifies similarly. The story told by these two witnesses is palpably false and no attempt was made before their Lordships to resuscitate these two witnesses rejected by the lower Courts.

(2) AT GAYA.

Leaving this evidenee in the state described above, it will be helpful to turn to the next group of events to ascertain how they affect the probability of this evidence being true. These are the incidents at Gaya, mainly the medical examination held by a lady doctor, first on 5th July, 1922 and subsequently in February, 1926. What happened at Gaya can be briefly told:—

On 4th July, 1922, the Dulhin, the Rajmata, Rabindra Deo, cousin of the Dulhin and Sitaram, a son-in-law of the Rajmata, with attendants and servants (including one Sukumari) forming one party, and Mr. Coutts and Mona Bux, since deceased, forming another, travelled by the same train to Gaya. Mona Bux was about 14 years old and owing to that fact, it was intended that he should have access to the zenena in order to identify the Dulhin before the examining doctor. It appears that at Gaya the Rajmata's party stayed at the rest house and Mr. Coutts and Mona Bux stayed elsewhere. Mr. Coutts arranged for a lady doctor, Miss De Menezes, the then Medical Superintendent of the Lady Elgin Hospital at Gaya, to examine the Dulhin at the rest house. On 5th July, Miss D. Menezes examined a woman, alleged by the defence to be the Dulhin, at the rest house and found her to be five or six months pregnant. The lady doctor gave a certificate in the following terms:—

Gaya.—"This is to certify that I have examined Dulhin Binodini Devi, identified as such by Lal Rabindra Nath Deo of Deogarh and Babu Sitaram Singh of Chogam and find her to be between five or six months pregnant."

(Signed) Miss L. D. Menezes, F.R.CSI.

Gaya, 5th July, 1922.

If matters had stood there, this certificate would have placed the defence case beyond all reasonable doubt. Here was a certificate given by an independent and competent lady doctor, stating

in clear terms the matter in controversy. But the matter does not end there. In February 1926 the same lady doctor examined the real Dulhin and came to the conclusion that the person she examined on 5th July 1922 was another woman, completely different in appearance from the Dulhin. A doubt is thus cast on the value of the certificate by its very author and the question arises how far Miss De Menezes' opinion and veracity are to be trusted. Miss De Menezes was examined on three different occasions: on commission on 21st September 1927 at Gaya, again on commission at Cawnpore on 1st September 1929 and lastly before the High Court on 24th October 1935. The High Court by a majority has relied upon her evidence very strongly. The judges had the advantage, which the trial judge had not, of seeing her demeanour in the box and it will be difficult to reject their appreciation, except upon grounds which clearly prove that their view was wrong. The High Court thought it necessary to examine her by reason of the explanation given by her of the certificate mentioned above and in order to remove any possibility of ambiguity and irrelevance affecting her testimony. The learned Chief Justice remarks that he is entirely satisfied that she is a witness of truth. Her evidence is that on 5th July 1922 she went to the rest house and with her went Mona Bux. The Rajmata admits that Miss De Menezes brought the boy with her, but that as his name was not mentioned and the Rajmata did not know that the boy was Mona Bux, she did not permit him to identify the Dulhin. It is difficult to accept the Rajmata's story that she did not know either that Mona Bux was in the party, or that he was the boy proposed for identifying the Dulhin. Referring to her visit on 5th July, Miss De Menezes further says that she was first shown into a room in which a number of people were assembled whom she did not know. She was told that she would be shown the Dulhin and would then examine her. She had been warned by Mr. Coutts—the manager, who was present throughout—that possibly an attempt would be made to substitute another person for the Dulhin. She was then taken to another room and met by the Rajmata. It was at this stage that the Rajmata refused to allow Mona Bux to go in and identify the Dulhin. It is difficult to understand, although it does not affect her evidence very much on material particulars, why Miss De Menezes, on finding the Rajmata obdurate about not allowing Mona Bux to go in, did not refuse to examine the woman presented to her; why she did not come out immediately and com-

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plain to Mr. Coutts, who was in charge of the identification on behalf of the responsible authorities. She appears to have felt no such doubts and went in alone. She saw a young woman seated on a chair, who the Rajmata said was the Dulhin. By reason of Mr. Coutt's warnirg about the possibility of impersonation, Miss De Menezes took particular pains to look at the countenance of the young woman and took care to remember it well. She pushed back the sari from the woman's face. She remembered the face quite well. It was oval, fair, with high-bridged nose and light eyes. She made an examination both internally and externally and found the patient to be five or six months pregnant. Miss De Menezes left the room and returned to the room which she had first entered and sat down to write her certificate in terms mentioned above. Mr. Coutts was present. She pointed out to Mr. Coutts the persons who had identified the woman to be the Dulhin. Mr. Coutts then supplied their names, which were Lal Rabindra Nath Deb and Babu Sitaram Singh, which she entered in her certificate.

With reference to her examination of the Dulhin in February, 1926, Miss De Menezes says that on that occasion she saw two ladies, one of whom she at once recognised to be the Rajmata. The other was certainly not the person she had seen in July 1922. The Rajmata persisted in assuring her that she was the same person, but Miss De Menezes adhered to her opinion; the lady she examined on the second occasion was dark, her face was more broad than oval and had a different type of nose. She was definite in her view that the two were entirely different persons.

Objections have been urged against Miss De Menezes' testimony, that her memory is not clear or correct as regards the identification by Lal Rabindra Nath Deb and Babu Sitaram Singh and that she is not accurate when referring to the stage at which she submitted the report; but it should be noted in answer to this that she was giving evidence before the High Court nearly 13 years after the event. It was not her duty to look to the identification. There was Mr. Coutts to see to that. She was there to examine the person who was presented to her. She had never met the Dulhin before and could not say whether it was the right person who was presented for her examination. As she says in one of her answers, "I knew there was the question of identity and I was therefore careful in giving my certificate." The certificate, on the face of it, bears her out, especially the words, "identified

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as such" and, commenting upon this wording, Miss De Menezes' explanation, given before the High Court, is convincing. She says, "I was careful to say, 'identified as such by so-and-so.' To me she was only a person who claimed to be so-and-so, so I guarded myself that she was identified as such by so-and-so." She further admits, "Perhaps I used a wrong English word. I should have said, 'alleged to be so and-so.' I told Mr. Coutts that these gentlemen say she is so-and-so. Mr. Coutts gave me the names." There is some confusion in her evidence as regards certain matters, e. g., the stage when she wrote the report, but on careful perusal of her entire evidence, their Lordships feel no difficulty in agreeing with the concurring judges of the High Court, that, notwithstanding some confusion and inaccuracies in matters of detail, she spoke the truth. A point was made which was not satisfactorily answered by the plaintiff, that if substitution took place as alleged by the plaintiff, how did Mr. Coutts feel satisfied about the correctness of the identification or certificate. He had every reason to be cautious and circumspect. He knew that Rabindra Deb and Sitaram Singh, to whom he apparently left the identification, were both interested in and related to the Dulhin and the Rajmata. Besides, Rabindra had come, according to Mr. Coutts' information to surreptitiously take the Dulhin away to her mother's residence before any examination could take place. He knew the Dulhin and he had besides good reasons for suspecting impersonation because of the initial circumstance that Mona Bux had been refused permission to go in. Another point which has likewise not been sufficiently explained is why should the Rajmata, who is, on the plaintiff's own hypothesis, a very intelligent, masterful and intriguing lady, risk substituting another woman so entirely different in appearance from the Dulhin as Miss De Menezes has testified ; she knew that Mr. Coutts would be present on the occasion and on the watch to detect falsehood, and he knew the Dulhin personally. The plaintiff's challenge had already been made openly and on more than one occasion. All these circumstances are urged as pointing to the impossibility of the lady doctor's certificate being untrue. These are undoubtedly difficulties in the plaintiff's way which have not been cleared. He has perhaps added to them by taking upon himself the unnecessary burden of proving that a woman called Nathunia was substituted for the Dulhin on 5th July, a theory which has been rightly rejected by the lower courts. But it is clear that these points could only have been cleared up, some by Mr. Coutts and some

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by the Dulhin, if they had given evidence. In the absence of this evidence any explanation offered in solution of these doubts, must largely be in the nature of a surmise. But whatever value these difficulties may have on the probabilities of the case, the fact remains that if Dr. De Menezes' evidence is accepted as truthful, as the concurring judges of the High Court have done, there is no escape from the conclusion that the woman she examined on 5th July was not the Dulhin. As supporting her testimony, their Lordships attach considerable importance to the wording of her certificate, especially the words, "identified as such," and her explanation that she used them in order to protect herself from any future possibility of disbelief. An attack was made on this lady's evidence on the ground that, as she was a very busy practitioner, it was impossible for her, in the absence of a note of the examination made in July 1922, to remember the details of the appearance of the lady she examined on that occasion. She has, however, given an explanation which appears satisfactory. She knew this to be an important case likely to appear in Court; she was warned to be careful about the person she examined, and that owing to these special circumstances and also because the case related to an aristocratic family, she took particular care to examine the appearance and she has, in consequence, a clear memory of the countenance of the woman she examined in 1922.

The contrary evidence is of the Rajmata and Rabindra. As against the clear and independent testimony of Miss De Menezes, it is difficult to believe these two witnesses. The evidence of Rabindra is open to many objections, as pointed out by the High Court and the evidence of the Rajmata has to be accepted with considerable caution, whenever her testimony is opposed to that of independent witnesses. Their Lordships do not agree with the learned Subordinate Judge's view that the Rajmata did not derive any benefit from the birth of a son to Surendra. It is obvious that if defendant 9 was the son of Surendra, the estate would remain in the line of her son with all consequent advantages to her branch of the family. It may be that her personal benefits, namely rights of residence and maintenance in the family as a Hindu widow, would not be affected by the events either way, but it cannot be denied that she was very keenly interested in the main issue of the case. Her subsequent conduct also shows that from the beginning she took the keenest interest in this case and, at a later stage, when the Dulhin dropped out,

she continued the proceedings with great perseverance, taking upon herself the burden of being the guardian *ad litem* of defendant 9.

(3) AT BAMRA.

The incidents at Bamra are mainly to be found in the evidence of the Bara Kumar, the Dulhin's uncle, his brother Rajib Lochan, her mother Dilraj Kumari and her cousin Rabindra, who has already been mentioned in connection with the incidents at Nawa and Gaya. These are the witnesses for the defence. On the other side there is the evidence of Mr. McPherson, the then Superintendent of the Bamra State and to the testimony, somewhat extraordinary, of a lady assistant surgeon, Mrs. Mazumdar, who examined the Dulhin The Dulhin. remained at Bamra until November, when she left for Calcutta in the circumstances which will be narrated later. Their Lordships are not disposed to attach much importance to some of the incidents which happened at Bamra. The evidence of the plaintiff's witnesses who testify to the Bamra incidents is material on two points: (1) as showing that the Dulhin had a miscarriage during or previous to her stay at Bamra; (2) as proving, from the personal observation of the Dulhin by some of the witnesses at Bamra, that the Dulhin, during her stay there, was not pregnant. The Dulhin's pregnancy during her stay at Bamra, if it existed at Nawa, would be far too advanced to remain unobserved. It is this fact which makes the testimony of the Bamra witnesses on the second point very material.

As for the theory of miscarriage, their Lordships do not attach importance to it, because it was never seriously suggested by the plaintiff's side, nor even seriously pursued. It is also inconsistent with the view established by the foregoing evidence that the Dulhin was not shown to be pregnant at Nawa or Gaya. In support of the theory of miscarriage, there is, in their Lordships' opinion, very little satisfactory evidence. The theory appears to have arisen mainly out of the impressions of Mr. McPherson. He had arrived in Bamra in 1922 and under him was working the Bara Kumar, the Dulhin's uncle. His evidence, on the points on which it is clear, is that he saw the Dulhin with his wife and the Dulhin admitted to him in course of the talk that she had been pregnant, but that she had a miscarriage and she was no longer pregnant, and he accordingly made a report to the Deputy Commissioner that she was not pregnant. The report has not been put on the record and there is no means of testing the

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accuracy of the witness's memory, which does not appear clear on many points of details put to him on the course of his deposition. Mr. McPherson admits that he got the impression from what the Dulhin told him. The conversation was going on in the Uria language and had to be interpreted from time to time by the Bara Kumar. The explanation given by the defendants' side, which is not unsatisfactory, is that the Dulhin stated that she had blood discharges, a fact supported by her mother's evidence, and that the expression (rakta srab) which she used led Mr. McPherson to imagine that she had admitted miscarriage. If, as the plaintiff says, the Dulhin had been consistently pretending pregnancy during the period April-October, it is difficult to believe that she would willingly admit miscarriage in October, thereby destroying the edifice which she and the Rajmata, with the aid of their relations, had built with such patient effort. It is also equally difficult to understand why, after making an admission of miscarriage, she would think of going to Calcutta, thereby reviving her story of pregnancy after it had been abandoned.

Mr. McPherson's memory, judging by what he stated before the High Court, where he was deposing more than 13 years after the incidents, is not very clear. His deposition shows that he did not remember many incidents and made mistakes on important details; for instance, he was not clear whether his visit to the Dulhin was in 1922 or 1923, when the report to the Deputy Commissioner was made, whether before or after he saw the lady, whether he saw the Dulhin at the date of the report, namely January, 1923, or in the previous October, or whether the Dulhin's visit itself to Bamra was October, 1922, or January, 1923. Many of his answers in cross-examination or in reply to questions put to him by the High Court judges are equally confusing and he is unable to give satisfactory answers to many vital questions e, g. as to why the Bara Kumar's and Mrs. Mazumdar's statements were not recorded till January, 1923, when the events to which they related took place in October, 1922. But, in spite of these infirmities of his evidence, which perhaps are natural, he is clearly of the opinion, based on his own observation, that the Dulhin was not pregnant when he saw her. He was asked more than once, "What is your impression about the state of pregnancy?". "In my opinion, she was not pregnant." The witness added that she was not "in the state of pregnancy which had been reported to him," that is about eight months, that is she was not visibly in a state of pregnancy. He makes it clear how he could come to this impression from her appearance. Asked

for details, he says that she stood up, passed her hand over her body and therefore he saw her. The interview must have lasted ten minutes at least. He was perfectly satisfied from what she said to him and from what he saw that she was not pregnant. On this point, his evidence has not been shaken in the course of a long cross-examination. While their Lordships feel difficulty in accepting his version about the miscarriage, it is not easy to reject his testimony on the point of pregnancy. He was a disinterested witness, acting on behalf of the authorities, who, at this stage, were either neutral or disposed to support the defendant's claim. He was seen by the judges of the High Court, two of whom have relied very strongly on his deposition and their Lordships see no reason to differ from their view.

The Bara Kumar gave evidence on commission for the defence on 6th December, 1927. He did not appear to give evidence before the High Court, although given an opportunity of doing so. His deposition, taken on commission, contradicted Mr. McPherson's evidence on material points, but he made a statement in writing before Mr. McPherson at a later stage, namely 9th January, 1923, in which he states. "I accompanied Mr. McPherson to the Dulhin's mother's house where the Dulhin was staying and I was present when Mr. McPherson interviewed her. The Dulhin told us that she had had a miscarriage and that she was no longer pregnant. This was in October last. I saw the lady myself and she did not show any signs of pregnancy". An attack has been made on the admissibility and value of this statement on many grounds, but without considering the details of the objection, their Lordships think it unsafe to rely on this statement for various reasons. The Bara Kumar denies having made such a statement and he has not been confronted with it, as required by the provisions of section 145 of the Indian Evidence Act. He had no opportunity of explaining this statement. It was besides made four months after the event in January, 1923. It is in Mr. McPherson's handwriting and the Bara Kumar only signed it. He must have known, at the time he made the statement, that the Dulhin was claiming to have given birth to the appellant in the previous December. On the plaintiff's own hypothesis, he was in the conspiracy, if so, it is difficult to understand how he could have made this statement voluntarily. A suggestion was made on behalf of the appellant that the Bara Kumar was a subordinate of Mr. McPherson and made the statement under his influence. This may or may not be so. But it is obvious that there are many difficulties in the way of accepting this statement at

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its face value and their Lordships have thought it proper to exclude it from their consideration.

As regards Mrs. Mazumdar's evidence, their Lordships have equal difficulty in accepting her testimony. She was examined on commission for the plaintiff on 25th November, 1929. She appears to have been an unwilling witness, took every opportunity to protract her deposition from day to day and her evidence on material particulars is contradicted by Mr. McPherson's evidence and by parts of her report in writing, made to Mr. McPherson at a later date, 17th January, 1922. In her deposition, she says that she saw the Dulhin in October, 1922, at her mother's place at the request of Mr. McPherson. It was cold at the time and the Dulhin was wearing warm clothing on her person. "Her entire body was covered with clothes. I only saw the face. When I went there I found many ladies and I told them that I had come to examine the Dulhin for pregnancy. At this all of them got annoyed and the Dulhin began to weep. After this I did not get her body uncovered to examine her. I only saw her face. I asked the Dulhin whether she was having her monthly courses and she said 'Jao, Jao (leave me alone). I am getting everything.' I understood from their behaviour that they uttered these words angrily. I could not form any opinion as to her pregnancy. I told Mr. McPherson that I could not form any opinion as to her pregnancy." In her written report to Mr. McPherson, made on 17th January, 1923, she says that she examined the Dulhin in the first week of October and found no outward sign of pregnancy. Further, the Dulhin told her that she was not then in the family way and she was still having monthly courses. Asked how she came to make such a report and why the important details mentioned in her deposition were omitted, especially her inability to form any opinion, she explained it by saying that it was at Mr. McPherson's instance that the report was made. This may or may not be true; but on a review of the whole evidence, their Lordships think it unsafe to rely upon her evidence or her report and they have less difficulty in doing so, as they reject the entire story of a miscarriage at Bamra.

The remaining evidence is that of Dilraj Kumari, the mother of the Dulhin, who says that when the Dulhin came to Bamra she was pregnant and remained so during her stay there; that she had blood discharges after a stay of a month and a half, but no doctor was called in. She denies that Dr. Mazumdar saw the Dulhin at all during her stay at Bamra. She is unwilling to admit

even innocent details about Mr. McPherson's visit, of which she must have known. She is, of course, very much interested in the issue of this case. Her subsequent conduct after the birth of defendant 9 dealt with later in connection with the "post-Calcutta occurrences", throws great light on the probability of her testimony being untrue. In dealing with her evidence as with that of the Rajmata, their Lordships think it unsafe to accept her testimony where it is contradicted by that of independent witnesses, or the probabilities of the case.

(4) AT CALCUTTA.

The next stage is at Calcutta. The material witnesses for the defence on this episode are Rabindra, cousin of the Dulhin, Mrs. Roy, the lady doctor who attended at the delivery and the maid-servant, Sukumari, alleged to have been present when the child was born. The defendant's version is that the Dulhin was sent to Calcutta for two reasons: (1) because of the family custom of ladies visiting Calcutta for delivery and (2) because the blood discharges were continuing and required medical treatment. While she was there she lived in the house of one Pravash Chandra Ghose, and it is alleged that three or four days before the delivery of the child, the lady doctor (midwife) Mrs. Roy was called in to see the Dulhin, that on the 8th December, 1922, the Dulhin gave birth to a male child, who is defendant 9 that Mrs. Roy was present at the delivery and that she attended the lady thereafter consecutively for 8 to 10 days and later at intervals.

There were at this time present with the Dulhin in Calcutta other relations, some of whom have not been examined in this case. These are the Dulhin's sister-in-law (husband's sister), Murali Sham Kumari and her husband Shri Prasad. The former was available as a witness before she died in 1927 and Shri Prasad is still alive. There were also living with the Dulhin at this time, Rabindra, cousin and Rajib Lochan, uncle of the Dulhin, who have been examined on behalf of the defence. Rajib Lochan, though examined in detail, makes no mention of the pregnancy of the Dulhin as coming under his observation in Calcutta; in fact no question has been asked to him as regards her pregnancy. He was a very near relation and stayed with her for four or five days. If the pregnancy existed, he would have seen it, as it was very advanced at that stage. Though he went with the Dulhin to Calcutta to keep her company in her travail, he left her before she was delivered. From his evidence he appears to be a very unobservant witness. As regards the maid-servant Sukumari she is clear in her deposition

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that a son was born to the Dulhin in Calcutta, that she was present in the delivery-room and that the sister-in-law was also present along with the lady doctor. In addition to the fact that she is a maid-servant completely under the control of the Dulhin and the Rajmata, there are many parts of her deposition indicating that she is neither an observant nor a truthful witness and their Lordships think that the concurring judges of the High Court rightly rejected her testimony.

As for Mrs. Roy's evidence the learned Chief Justice has commented adversely on it, relying on an important detail, that she gave what he thought was a false address. Their Lordships do not think that the point is clear from her evidence, nor would it be an adequate reason for discrediting her testimony if it was otherwise reliable. The main infirmity of her testimony however, assuming its truth, is that it is not helpful on the material question whether the lady she delivered was in fact the Dulhin. She was a total stranger to the Dulhin, had never met her before and her testimony furnishes no convincing proof that the woman she delivered was the Dulhin. She admits in her cross-examination, " As all people in the house used to call her Dulhin, I came to know her as such." She apparently had no personal knowledge of the Dulhin. There are many other features of her deposition which show that her testimony cannot be implicitly relied on. She is a professional midwife and her status and position are not such as to compel the acceptance of her testimony, as against the several difficulties which this case presents, including the testimony of a well qualified doctor, Miss Hamilton Brown, whose evidence will be dealt with later. One point, however, which Mrs. Roy clearly states is that the child which took birth at Calcutta on the 8th was a child born in normal time. Similar difficulty arises in accepting the testimony of the landlord Pravash Chandra Ghose and the astrologer Pandit Mahadeo Dutta Sharma. To both these witnesses the Dulhin was a total stranger. They heard from the persons in the house that it was the Dulhin who had given birth to a child and they accordingly thought so. They did not know, of their own knowledge, who had given birth to the child.

As against this evidence, the plaintiff has tendered two witnesses, who are independent and have no interest in the issue of the case. The first is Mr. Lyall, the Commissioner of Chota Nagpur Division and connected with the encumbered estates of Palamau and Deogan. He apparently occupied a detached position and was the person who had kept himself in touch with Mr. McPherson, He

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says that he called on the Dulhin with the lady doctor, Miss. Hamilton Brown, on receiving a telegram from the Dulhin, informing him of the birth of the child. His object in paying this visit was to obtain irrefutable evidence of the Dulhin giving birth to the child, as her pregnancy had been challenged. He took Miss. Brown with him for the purpose of having the Dulhin examined at a time when the physical evidence of the delivery would be fresh and noticeable. He warned the Dulhin's relations, whom he met at her residence, of the importance of such an examination and also of the consequences of a refusal. His warning was in clear terms, that if the opportunity of having independent medical testimony was not availed of, an adverse inference would be drawn against the authenticity of the birth and that he had got the best lady doctor for the purpose of the examination. In spite of this warning, the Dulhin's friends reported that she was not willing to be examined. To relieve any possible anxiety of the Dulhin, Dr. Hamilton Brown assured her that the examination would cause no pain. Still the refusal was persisted in. Mr. Lyall then asked Dr. Hamilton Brown to pay a second visit on any day during the period of ten days, to examine the Dulhin and find out whether she had given birth to a child. Accordingly, Miss. Hamilton Brown paid a second visit, when also she was not given an opportunity of examining the lady, but only the child was shown to her.

On all important points, Mr. Lyall is corroborated by the testimony of Dr. Hamilton Brown, who gave her evidence by way of answers to written interrogatories. She confirms Mr. Lyall's memory of the two visits, on both of which occasions she was denied permission to examine the Dulhin and on the second occasion only a child was shown to her. She repeats that clear warnings about the adverse consequences of the Dulhin's refusal to be examined were given to the Dulhin and her friends without any success.

The explanation of this refusal offered on behalf of the defence is twofold (1) that the Rajmata was not present in Calcutta and, in her absence, no one would take the responsibility of having an internal examination of the Dulhin by a strange European doctor. (2) The sentiments of the family were averse to taking the child out of the delivery-room during the first few days of child-birth, when it is considered unpropitious to expose the child to the observation of strangers. This latter ground loses its weight, when it is remembered that on the second occasion, which was within ten days, the child was in fact shown to Dr. Hamilton Brown. As

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regards the first ground, it is not of much value, as the Rajmata was then residing at a day's distance by rail and her permission by letter or telegram could have been speedily obtained.

It was suggested on behalf of the appellant that as Dr. Hamilton Brown was entirely a stranger, the refusal could not be imputed to a fear of her discovering that the patient was not the Dulhin. The probable answer is that, having regard to the happenings at Gaya and Bamra, Mr. Lyall would perhaps have taken greater care about identification, for instance, by obtaining a thumb impression of the Dulhin, so as to place the case beyond all possibility of doubt The defence knew, at this last stage of what they called the plaintiff's persistent persecution of the Dulhin, that this was their final chance of indisputably establishing the identity of the Dulhin. The Dulhin then had the advice of two male relations, Shri Prasad and Rabindra, who must have realised the consequences of the refusal. The refusal, therefore, is very significant.

It is equally significant that though the Dulhin went to Calcutta for obtaining medical advice on her ailment, no doctor of any prestige or renown was called in prior to her delivery. She was having blood discharges, which according to her mother's evidence, became more frequent as time went by. It may be noted here that in the list of documents which the Dulhin filed as the appellant's guardian are mentioned two certificates, one granted by a Miss. S. Ghosh, M. B., F. R. C. S., Calcutta and the other by a lady doctor named Cox of Calcutta Campbell Medical School, both certificates being "for change of climate on account of illness of the Dulhin due to her giving birth to a child". It is strange that though no lady doctor of any importance was called before pregnancy or for the delivery, two lady doctors were called for the comparatively unimportant purpose of obtaining opinion as regards change of climate on account of illness due to the delivery. The names of these two lady doctors appear in the list of witnesses, whom the defence desired to be examined on commission and it is stated in the defendant's petition asking for time for the production of these witnesses, that these two lady doctors used to attend the Dulhin.

It appears that there were two other doctors consulted ; Babu Boral, M. B., and Dr. Diwan Bahadur. The record shows that though the Commissioner gave, from time to time, facilities for the production and examination of these witnesses, they were not ultimately examined ; in some cases because the witness refused to accept notice ; in others because they were not available on the day of the examination. The omission, in their Lordships'

view, is not without significance. The only explanation given was that these doctors stipulated prohibitive fees for giving evidence, a plea which it is difficult to accept, when it is remembered that the Dulhin's friends generously pressed Dr. Hamilton Brown to accept a sum of 200 rupees in lieu of her usual fee of 32 rupees for two visits, and, as Dhavale J. observes in his judgment, leading counsel from Patna were engaged for the defence, which the learned Judge describes as "a notoriously expensive matter."

It is an extraordinary feature of this case that on all occasions when the stage was set by the authorities for obtaining unimpeachable proof of the pregnancy of the Dulhin, the defence failed to meet the test, by being guilty of a flaw here and an excuse there, which resulted in delaying, from time to time, the production of proof of sufficient potency to end the controversy finally. At Gaya, although the Rajmata had the opportunity, she did not allow Mona Bux to go in and identify the Dulhin. It was a simple affair. He was a boy of 14. His identification did not necessarily involve his presence on the occasion when the internal examination of the Dulhin took place. At Bamra, the Dulhin's refusal to be examined by Mrs. Mazumdar again had the same effect. At Calcutta, the same difficulty appears. The Dulhin and her friends refused to allow an independent medical practitioner to examine the Dulhin, though they were assured that the lady doctor was the best to be obtained in Calcutta, that her examination would cause no pain, and, if successful, the test would finally end the controversy.

Doubts thus arise at every stage, each by itself perhaps insignificant or explicable, but their cumulative effect is to produce the impression that at every determinative stage, the defence has evaded facing the truth.

(5) POST CALCUTTA INCIDENTS.

The several incidents which can be grouped under this category are equally suggestive. If defendant 9 was the son of the Dulhin, his birth should have been hailed with acclamation by the Rajmata and the other relations. He was a posthumous son, the scion of an aristocratic family and the sole heir and in that sense, its sole hope of succeeding to a large estate, which was about to emerge from the last stages of official management. Failing him, the estate would reach the hands of rivals, who would be, under circumstances generally attending such affairs,

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bitterly hostile. Yet, as the evidence makes clear, there was hardly any rejoicing worthy of the occasion; or any adequate notice taken of the child by the nearest relations. Though the custom of sending presents to grandchildren is admitted, Dilraj Kumari, the maternal grandmother, sent no presents to the child and is unable to explain the omission. The usual rejoicings and celebrations on the birth of a son and heir did not take place. There were none in Calcutta. The chatti ceremony, which should have been performed there within the first week of the birth, was not celebrated. The pre-natal rites, ensuring the birth of a son to the pregnant woman, which are usual amongst such families, were not performed. At Chatterpur, a Jalsa took place, but no respectable men were invited, nor those relations who would ordinarily attend such a function. Deogan in Bamra received the news of the birth very quietly. No sweets or gifts were distributed, the boy received no presents. His paternal grandmother, the Rajmata, who took such a prominent part in the pregnancy stages of the story, suddenly cooled down in her ardour after the birth; she did not even visit Calcutta to see the newborn grandchild; in fact, she did not meet him for many months thereafter. The maternal grandmother Dilraj Kumari did not see the boy for a long period of five years.

Communication of the birth was made to the authorities by telegram, but no communications took place between the two grandmothers, exchanging greetings or congratulations on the birth. They exchanged letters on pregnancy, but none on the birth. The Dulhin, instead of going to the Rajmata with the newborn child, her solace in her old age, goes to Benares for no apparent reason. Her subsequent behaviour is still more inexplicable. With the help of her Bamra uncle, the Bara Kumar and on the advice of her cousin, the Thakore of Jharia and her sister's husband, Raj Kishor, who apparently watched her welfare, she entered into a compromise with her inveterate foe plaintiff 1, who according to her previous story, had persecuted her from place to place, from April to December, 1922. By that compromise she gave away completely the rights of her son and declared that plaintiff 1 was the proprietor of the entire estate and, as such, was put in possession of it—an admission completely destructive of her previous contentions. This she did for benefits, which were more illusory than real. She got a paltry amount for the expenses of the marriage of her minor daughter, a charge in any event leviable on the family property. The amount too was not to be paid

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immediately, but was only to be deposited within six years of the execution of the deed. There was also a minor payment of a sum of Rs. 10,000 to meet the expenses of the suit under appeal—another charge on the family funds, if the litigation was for the bona fide protection of the family estate. It is unnecessary to go into other details of this compromise deed, as they have been sufficiently commented on in the judgments of the lower courts. The only explanation offered is that the Dulhin was not a free agent in arriving at it, but succumbed to the duress of Mr. Mears, the Manager of the estate, who threatened her with imprisonment and criminal proceedings. It is difficult to accept this explanation, in the face of the fact that her own cousin and uncle were advising her.

Her subsequent behaviour is equally unaccountable. The Rajmata has complained that since the date of the compromise, the Dulhin has become lukewarm, if not hostile. She had been living with Raj Kishor at his residence, which for a widow of her age is undoubtedly unusual. The Rajmata tried to bring her to her residence, sent a servant, personally went to bring her, but was not allowed to meet her. The Dulhin is now living estranged from her mother-in-law and completely indifferent to the interests of her alleged son. The defence affords no satisfactory explanation of this volte face. That it was a complete change of front cannot be denied, for up to the year 1928 the Dulhin was extremely active in protecting the interests of her child. In 1924 she applied for a mutation of names in his favour and to be appointed his guardian ad litem in this suit. Later in 1925, she objected to the appointment of a receiver in terms which show that she was then very keenly alive to the rights and interests of her son. In 1925-6 she was actively concerned in having her son's horoscope cast and sent money for that purpose to an astrologer. After the compromise, she grew totally unmindful even of the existence of her son. In 1931 she wrote a letter, in which she sent compliments to a distant relation, but made no reference to her son.

For all these reasons, their Lordships find it difficult to accept the defendant's version as proved and, they are compelled to accept the conclusion at which the majority judgment of the High Court has arrived.

In doing this, their Lordships feel constrained to observe, that they are fully aware of the fact that the evidence adduced by the

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plaintiff has not at all been helpful and that in parts it is not even truthful or convincing. He has not been able to substantiate the theories, which he took upon himself, in their Lordships' opinion unnecessarily, the burden of proving, for instance that a woman called Nathunia Kaharin impersonated the Dulhin at Gaya and another woman, the wife of one Lochan Bhuinya impersonated her at Calcutta and her child was shown to Dr. Hamilton-Brown and that on the subsequent death of that child at the age of 1½ years, the child of a third person, called Jamadur Rai has been put forward. These allegations have not been satisfactorily proved. Their Lordships are equally well aware that there are many difficulties, to some of which they have already referred, in accepting some of the suggestions made on the plaintiff's side.; but as Dhavale, J. rightly observed in his judgment, it was for the defence to prove beyond all reasonable doubt that the appellant was the son of Surendra, born of the Dulhin at Calcutta on 8th December, 1922. It was not incumbent on the respondents to disprove the appellant's case and their failure to support their own theory does not prove the truth of his.

Their Lordships agree with the view of the majority judgment of the High Court and are of opinion that the appeal should be dismissed and the decree of the High Court affirmed. The appellant will pay the first repondent's costs of this appeal.

Their Lordships will humbly advise His Majesty accordingly.

Nehra & Co.: Solicitors for the Appellant.

Douglas, Grant & Dold: Solicitors for the Respondents.

A. T. M. *Appeal dismissed.*

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REVIEWS.

Pleadings in India by J. P. Agarwala, Publishers Messrs. S. C. Sarkar and Sons Ltd., 1-1-1C. College Square, Calcutta, 1940.

There are not a good many works on pleadings in India on the lines of Bullen and Leake; therefore, a good book on the subject is always welcome. The Indian system of pleading has often been found fault with by many eminent authorities, perhaps not without reason, but at the same time it will perhaps be no distortion of fact to say that very few of these adverse critics, though otherwise very learned, have much drafting experience to their credit. Good drafting is the outcome of vast experience of actual penmanship combined with sound legal knowledge. Therefore, an academical criticism of the art is neither instructive nor helpful in training beginners in this work. What is wanted is the presentation of good models before them with sufficient general instructions to them to take exercises of their own. This is exactly what the book under review has done and in that way it has removed a real want. It has been said that prolixity, argumentativeness and uncertainty of case are some of the main defects of the Indian method of drafting and the learned author has endeavoured his utmost to free his specimens from these shortcomings. He is however conscious that extreme brevity at the sacrifice of the essential particulars in pleadings may at times prove fatal; that is why he has departed on many occasions from the statutory specimens furnished in the appendices to the Code of Civil Procedure. The learned author possesses a consummate skill in the art of drafting and he has given sufficient proof of his ability almost in every specimen he has presented to his readers. The greatest merit of the work is that no unnecessary fact has been introduced in any of the forms, nor has any essential fact been omitted from any one of them. The book however does not pretend to have anticipated every

possible complexity of situation that can arise in the special circumstances of each individual case, nor has the learned author expressed any desire that his forms should be slavishly followed. That is however neither practicable nor desirable. That is why the learned author has given certain general instructions which his readers would do well to attend to and keep in view when undertaking any drafting work. It will always yield a satisfactory result if these skeleton forms be taken as models and if after the completion of any composition work, the same be compared with them. We have not the least doubt that the utility of this publication will generally be appreciated and it will grow into a popular publication before long.

The Law of Arbitration in British India, by R. B. Dwan Chand Obhrai, published by the University Book Agency, Lahore, 1940. Price Rs. 12/.

This is an exhaustive legal treatise on the law of arbitration in force in British India. The book contains a complete statement of the law on the subject scientifically analysed and arranged under appropriate headings ard sub-headings. To help ready comprehension of the subject and to facilitate easy recollection and application of the law, its learned author has tried to bring the basic principles of the law to the forefront of his commentaries, and has always shown by copious references to adjudged cases how these basic principles have been applied in deciding the points of controversies in individual cases. Wherever there has been any divergence of judicial opinion with respect to any particular matter, the learned author has ventured to give his own opinion as to what extent or for what reason any particular ruling can be accepted as sound or regarded as erroneous. In developing the law and in elucidating it in all its aspects the learned author has profusely cited the judicial precedents from all the available reports without making any fetichistic discrimination between the official and the non-official ones. English cases, in so far as they are helpful in interpreting the Indian law, also, have received their due, share of attention from the learned author. The book is in every sense a true legal treatise and is something more than a mere digest or a simple case referencer. Although, as a whole the book is immensely useful, still we cannot help observing that its general scheme has become a bit complicated by reason of the fact that it was originally worked out of a small book which the learned

author had written before in the form of a collection of case law on the Indian Arbitration Act, of 1899 and the Second Schedule of the Code of Civil Procedure, and was made ready for the Press, when all on a sudden a complete recasting of the book became necessary in consequence of the re-shuffling of the whole law by the new Act of 1940. It would have perhaps been much better from the point of view of the practising lawyers, if the book, instead of being dressed up in its present shape, had been presented in the from of a simple annotated edition of the new Act of 1940. However, the intrinsic worth of the book as a legal treatise remains all the same and it is expected to render valuable assistance to the members of the legal profession as a whole. The get-up of the publication is perfectly satisfactory.

Hindu Law by Golap Chandra Sarkar Sas'ri, Eighth Edition by R. N. Sarkar ; published by Messrs. S. C. Sarkar & Sons Ltd., 1/1/1C, College Square, Calcutta, 1940. Price Rs. 12.

This classical work on Hindu law has been known to the legal profession for more than a quarter of a century and hardly stands in need of any introduction from us. Its author was an eminent jurist, a great Sanskrit scholar, and an acknowledged authority on Hindu Law. This book from the very date of its first appearance in the field came to be recognised as a leading publication on the subject, and the reason for this was that the notes in the book on many a debatable point of Hindu law were prepared on an actual examination of the language of the relevant Sanskrit texts in their original. A direct familiarity with the original texts has enabled the learned author to present the spirit of Hindu law in its correct perspective and to challenge the accuracy of expositions of law based on imperfect renderings of the *slokas* quoted from the works of the old Smriti writers. The general confidence reposed in this publication is so very great that no lawyer considers his research work over any point of law complete until he has had an opportunity of consulting it. The multifarious points of excellence in this book are so widely known that it is hardly necessary for us to recount them here. The task of re-editing the present volume has fallen on the illustrious son, of the illustrious father, who also possesses a specialised knowledge of Hindu Law, and, in consequence, the general merit of the book has not in the least suffered in the process of the revision work. The learned present editor is quite alive to the recent developments of the law brought about by fresh legislation and has well indicated the present state

of the law as it now stands after such statutory modification. The effect of the latest judicial pronouncements has also been shown. The utility of the publication has been considerably enhanced by employment of up-to-date techniques of legal publications. The get-up of the book also has been improved.

Land Acquisition Acts and principles of valuation by Rai M. N. Gupta Bahadur, published by Messrs. S. C. Sarkar & Sons Ltd., of 1/1/1C College Square, Calcutta, 1939.

This is an useful annotated edition of the Land Acquisition Acts incorporating all the recent amendments, as also the latest decided cases. Its learned author having served as a Land Acquisition Collector has practical knowledge of the provisions of the Act and this has enabled him to deal with many of the practical problems that arise for consideration in working out the provisions of the Act, but upon which up till now no judicial pronouncements have been made. Thus, the book offers to give some assistance in relation to matters for which scarcely any guidance can be obtained in the existing works on the subject. The learned author has given extensive notes in relation to a large variety of interests in property that may have to be valued in land acquisition proceedings and has given his own views as to the proper methods to be adopted in valuing them accurately or as to the factors that have to be taken into consideration for ascertaining this market value. His notes in respect of all these matters are so very scientific and illuminating that it is well-nigh impossible to do without them, especially for officers employed in land acquisition work. The legal aspect of the subject also has not been neglected and the publication may prove useful to the members of the legal profession as well, although it would seem that the learned author having spent a greater part of his time in executive work has not developed the necessary degree of consciousness as to the requirements of legal circles. That perhaps accounts for the fact that the topic of *res judicata* has not been exhaustively treated in the book and altogether omitted from the subject index. An omission to take notice of the textual alterations introduced by the Government of India (Adaptation of Indian Laws) Order, 1937, is also traceable to the same cause. Such defects are inevitable in legal works undertaken by people working outside legal atmospheres and should not be reckoned to the prejudice of a publication which has many noteable features in other respects. On the whole, the book may be recommended to those for whom it has been primarily intended.

NOTES OF CASES.

In re A Pleader, respondent.

Legal Practitioners Act (XVIII of 1879), section 13—District Judge directed by High Court to hold enquiry, if can delegate this power to the Additional District Judge.

1939. I. L. R. [1940] Mad. 433 F. B.

The High Court directed that an enquiry regarding the professional misconduct of a pleader be held by the District Judge who asked the Additional District Judge to do so and his report was submitted to the High Court.

Held [per *Leach C. J.*, *Gentle* and *Krishnaswami Ayyangar JJ.*,]—that the power was delegated to the District Judge personally and not as court, as the enquiry proceeding was not a civil suit and hence he could not further delegate that power.

S. C.

P. R. S. A. R. Periakaruppan Chettiar *v.* P. S. A. R. A. R. Arunachalam Chettiar.

Provincial Insolvency Act (V of 1920) sections 35, 37.

1939. I. L. R. [1940] Mad. 441 F. B.

Arunachalam got his two debtors adjudicated insolvents *ex parte* but the previous mortgages by the insolvents were not set aside. The insolvents and another creditor Periakaruppan applied separately for annulment of adjudication order and this was allowed by the trial court but dismissed on appeal. On revision :

Held [per *Leach C. J.*, *Wadsworth* and *Patanjali Sastri JJ.*]—that since no act of insolvency was committed the court was bound to annul the adjudication and that the money paid by the insolvents to a creditor which passed by court's order to the Official Receiver could not be recovered by such creditor but should be distributed rateably amongst all the creditors.

S. C.

Gundavarapu Seshamma *v.* Kornepati Venkata Narasimharao.

Hindu Law—Adoption by widow with consent of divided agnates—Practice of following precedents.

1939. I. L. R. [1940] Mad. 454 F. B.

Subbamma a Hindu widow took in adoption Narasimharao, her husband's brother's son with the consent of her husband's brothers. After her death, her daughter Seshamma brought a suit challenging

the adoption alleging that consent of major son of Subbamma's sister was not taken, but it was dismissed. On second appeal it was referred to Full Bench :

Held [per *Leach, C. J., Krishnaswami Ayyangar* and *Somayya, JJ.*]—that the widow was not bound to consult the daughter's sons, that a single Judge of High Court is not bound by the decision of another single Judge and that a Division Bench being the final court of appeal should follow the decision of another Division Bench and should refer the matter to a Full Bench if it disagrees with such decision.

S. C.

In re Annamalai Mudali (accused).

1939. I. L. R. [1940] Mad. 514.

Code of Criminal Procedure (Act V of 1898), sections 342, 537.

The accused was last seen with his wife at a place far away from his home and the next morning his wife's dead body was found there with marks of strangulation. The accused was convicted of murder on circumstantial evidence as also on his alleged confession to a witness and was sentenced to death. On reference to High Court :

Held [per *Burn* and *Mockett, JJ.*]—that section 342 is sufficiently complied with if the accused by his statement or by answers to questions or by both is found to have knowledge and to explain away the circumstances leading to his guilt even if the Judge does not put to him all the items of evidence against him and that a conviction should not be set aside for any such omission unless it has led to failure of justice.

S. C.

In the matter of an Advocate.

1939. I. L. R. [1940] All. 60 F. B.

Bar Councils Act (XXXVIII of 1926), section 15—Advocate advancing loans occasionally, if "engaging in trade or (money-lending) business."

An Advocate advanced moneys to his friends and relatives on three mortgages and nine promissory notes from 1926 to 1936. :

Held [per *Iqbal Ahmad, Rachhpal Singh* and *Hunter, JJ.*]—that occasional and disconnected loans if advanced by an Advocate even to strangers without an element of system, habit and continuity do not constitute "engagement in trade or money-lending business" and the High Court ordinarily accepts the findings of the Bar Council provided these are not perverse.

S. C.

Emperor v. Hans Hotz.

Indian Electricity Rules 1937, rules 48(1) and 123—Unlicensed supervisor and not the mistry is liable.

1939. I. L. R. [1940] All. 67.

Kishen Prosad a mistry of Laurie Hotel belonging to Hotz trust of which Hans Holtz a qualified but unlicensed electrical engineer was a beneficiary, replaced under Hans' supervision the old wiring on the surface of the walls by new wires buried in the walls and both of them were convicted. On revision :

Held [per *Ismail, J.*]—that except replacements of lamps, fans, fuses, switches etc., or of old wiring by new wires in the original place, all other addition, alteration, repair and adjustment of existing installation do not require proof of alteration of capacity or character of old installation in cases for prosecution of breach of rule 48(1) and that the unlicensed supervisor and not the mistry is guilty under rule 123.

S. C.

Kulsumunnissa v. Raghubar Dayal.

Civil Procedure Code (Act V of 1908), order 21, rule 98—"Judgment-debtor", if includes a person against whom the decree acts as res judicata.

1939. I. L. R. [1940] All. 87.

An attempt for possession by Kulsum, the zemindar, in execution of her decree passed against one member only of the joint family was resisted by Raghubir, another member. Kulsum's application under order 21, rule 97 was dismissed under rule 99. On revision :

Held [per *Mulla, J.*]—that though the decree operated as *res judicata* against Raghubir yet he is not a "judgment-debtor" within order 21, rule 98.

S. C.

Prem Dulari v. Narain Prasad.

Special Marriage Act (III of 1872), section 3—Local Government, if can limit the powers of Marriage Registrars.

1939. I. L. R. [1940] All. 99.

Prem Dulari's marriage with Narain, both non-Arya-Samajists, solemnised by a Registrar appointed for Arya-Samajist marriages, was dissolved by the District Judge. On application for confirmation :

Held [per *Collister, Allsop* and *Bajpai, JJ.*]—that Local Government can under section 3 limit the powers of the Registrar and that the marriage not being proved no decree for dissolution thereof can be passed.

S. C.

Ranbir Karam Singh *v.* J. C. Bhattacharji.

1939.
I. L. R [1940] All 100.

Indian Succession Act (XXXIX of 1925), sections 5, 23, 24, 25, 26—Caste Disabilities Removal Act (XXI of 1850), section 1—Succession to property of Sikh Christian making adoption.

Bhattacharji's claim to succeed to the property of a Sikh Christian as the brother of the deceased Sikh's widow was decreed disallowing Ranbir's claim as an " adopted son " who was brought up by the Sikh, the parties being all Christians. On appeal:

Held [per *Bennet* and *Verma, JJ.*]—that succession to the property of a Christian convert is governed by Succession Act which has no provision regarding adoption and that Caste Disabilities Removal Act deals with right, not including a right to adoption, of the convert to any property but not to succession.

S. C.

Tara Chand *v.* Madho Prasad.

1939.
I. L. R. [1940] All. 121.

Letters Patent, section 10—Order refusing stay of execution, if a "judgment" and if appealable.

In two Letters Patent appeals the same point viz. " Whether the order refusing stay of execution by the Hon'ble Single Judge is a 'judgment' and if an appeal lies therefrom under clause 10 " arose:

Held [per *Thom, C. J.* and *Ganga Nath, J.*]—that it is not a " judgment " within clause 10 and hence not appealable.

S. C.

Satdeo Prasad *v.* Debi Badal.

1939.
I. L. R. [1940] All. 132.

Powers of Vakil under a Vakalatnama—Civil Procedure Code (Act V of 1908), order 23, rule 3—Compromise with permission of Court, if can be set aside by minor in a subsequent suit.

An Advocate engaged under a Vakalatnama empowering him to *file* compromise and do all acts for the plaintiffs *entered into* a compromise with Court's permission. The minor plaintiff's suit for setting it aside was dismissed by lower Courts. On appeal:

Held [per *Iqbal Ahmad* and *Bajpai, JJ.*]—that the Advocate had power to enter into compromise and that the question viz., whether it was for minor's benefit or not can not be raised in a subsequent suit.

S. C.

PRESENT: *Lord Thankerton, Sir George Rankin, and Mr. M. R. Jayakar.*

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v.

SANGAT SINGH AND OTHERS.

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[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT LAHORE.]

Suit for declaration—Will, construction of—Absolute estate subject to repugnant condition—Civil Procedure Code (Act V of 1908), O. 2 R. 2—Same cause of action—Decree, if to be registered—Registration Act (III of 1877), Section 17 (i)—Compromise, recording of—Reference of compromise in decree—Compromise not recited in decree—Civil Procedure Code (Act XIV of 1882), Sec. 375.

Ishar Singh on 19th September, 1905, made a Will. By his Will he declared himself to be the absolute and exclusive owner of the property which he disposed of thereby. He made the following dispositions in favour of his wife. ;

"4............My wife is Musammat Bishan Devi............I make this Will in her favour that she shall be exclusive owner of the following properties after my death.

"(a) Entire cash including pro-notes for Rs 13,000 and other items.

"(b) Liquor............

"(c) Land, situate in Nathe.

"(d) Lands, situate in Lyallpur.

"(e) Three-quarter share in Nowshahra property.

"(f) All ornaments.

"............My wife, Musammat Bishan Devi, may manage the said property in whatever way she likes. She shall have all kinds of powers to deal with the property aforesaid. She shall be considered full owner............

"7. After the death of my wife............whatever property remains shall be owned by the sons of Sundar Singh............Besides, my wife............shall not be entitled to sell immoveable property. The sons of Sundar Singh shall also have no such right,

"8. The remaining moveable or immoveable property of mine shall be exclusively owned by my wife." :

Held, that the effect of the Will was to make Bishan Devi absolute owner, the prohibition against selling the immoveable property was a condition attached to an absolute interest. The prohibition against selling must be disregarded as repugnant to the absolute gift to wife.

On the 12th November, 1906, Sundar Singh, son of Ishar Singh, filed a plaint in the Court of the District Judge, Peshawar, against Bishan Devi and other

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persons He claimed a declaration that the Will of Ishar Singh was not valid or binding on him as regards (*inter alia*) the immoveables at Mahal Nathe and Nowshahra etc. The sole relief claimed was a declaration. The plaint stated that "a separate suit will be brought for recovery of the ornaments.........other moveable property and lands situate at Lyallpur which are in possession of the defendants.''

This suit was compromised in June, 1907. On the 9th June a petition to the Court of the District Judge was signed by Bishan Devi and by Sundar Singh. The main terms were that the lands at Mahal Nathe and at Lyallpur should belong to Bishan Devi for her life and on her death to Sundar Singh and his male descendants.

On 11th June the District Judge passed a decree. By his decree the District Judge "ordered that a decree be and the same is hereby passed on the terms and under the conditions embodied in the deed of compromise, dated 9th June, 1907, as a whole with this reservation.......... "

Held, that the compromise was not bad by reason that Bishan Devi was not advised that she could safely treat the claim of Sundar Singh to the Lyallpur lands as barred under O. 2 R. 2 of the Code of Civil Procedure (section 43 of the Code of Civil Procedure, 1882).

That a claim to relief in respect of lands at Lyallpur situated in the Punjab, outside the district of Peshwar could have been entertained by the District Judge under section 19 of the Code of Civil Procedure, 1908.

That the claim to recover possession of the Lyallpur lands and the claim to a declaration as regards other lands were not claims in respect of same cause of action.

Payana v. *Pana Lana* (1) referred to.

That the claim of the appellants as reversioners of Ishar Singh would not have been barred so far as regards the question whether Ishar Singh's will gave to his widow an absolute interest or an interest for her life.

The decree did not require registration under section 17 (1) of the Registration Act, 1877.

That the District Judge at Peshawar had jurisdiction to pass the decree as regards lands at Lyallpur.

That the decree recorded the compromise though the compromise was not recited textually either in the body of the decree or in a schedule thereto.

Pranal Annee v. *Lakshmi Annee* (2) and *Hemanta Kumari* v. *Midnapur Zemindary Co. Ltd.* (3) referred to.

That the compromise, if considered as a contract, was valid and binding upon Bishan Devi.

That when advantage was taken of the decree so far ago as 1907, it could not be set aside at her instance in 1929.

(1) (1914) L. R. 41 I. A. 142.
(2) (1899) L. R. 26 I. A. 101 (106); I. L. R. 22 Mad. 508.
(3) (1919) L. R. 46 I. A. 240 (247); I. L. R. 47 Calc. 485; 31 C. L. J. 298.

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Privy Council Appeal No. 54 of 1937 by the Plaintiffs, against the judgment and decree of the High Court at Lahore, dated the 31st January, 1936, reversing the judgment and decree of the Subordinate Judge, Lyallpur, dated the 31st January, 1935.

The material facts appear from the judgment.

H. S. Gour and *R. K. Handoo* for the Appellants.

J. P. Eddy, K. C. and *M. H. Rashid* for the Respondents.

Their Lordships' judgment was delivered by

February, 26.

Sir George Rankin :—This appeal is brought from a decree of the High Court at Lahore dated 31st January, 1936, reversing a decree of the Subordinate Judge, Lyallpur, dated 31st January, 1935, and dismissing the appellants' suit. The subject matter of the dispute is some 6¾ squares of land in the district of Lyallpur in the Punjab, which (as is now admitted) belonged to one Ishar Singh who died childless on the 6th October, 1905, leaving him surviving a widow Bishan Devi; also a brother's son Sundar Singh who died on 10th January, 1922. On the 7th February, 1929, the widow purported to make a gift of one portion of the land to Sangat Singh (respondent No. 1) and of another portion to a certain Gurdwara (respondent No. 2). The present suit was brought on the 7th August, 1933, by the appellants, who are three of the four sons of Sundar Singh. The fourth son was made a defendant and is now respondent No. 3. The claim of the plaint is for a declaration that the gifts of land to Sangat Singh and to the Gurdwara have no validity or effect beyond the life of Bishan Devi.

Ishar Singh on 19th September, 1905, made a will of which probate was granted to Bishan Devi by the District Judge of Peshawar on 3rd November, 1906. Apart from an interest in the family house at Rawalpindi, Ishar Singh by his will declared himself to be the absolute and exclusive owner of the property which he disposed of thereby. He declarad that Sundar Singh, his nephew, was disobedient and of bad character and was to be totally disinherited. He made the following dispositions in favour of his wife :—

4. My wife is Musammat Bishan Devi. She has greatly served me. She has all along been faithful to me. I make this will in her favour that she shall be exclusive (*illegible*) owner of the following properties after my death :—

(*a*) Entire cash including pro-notes for Rs. 13,000 and other items,

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(*b*) Liquor, Charas, Opium, etc., of all kinds.

(*c*) Land, situate in Nathe.

(*d*) Lands, situate in Lyallpur.

(*e*) Three-quarter share in Nowshahra property.

(*f*) All ornaments.

Sundar Singh or any other person shall have no connection therewith, nor shall they interfere in the management thereof. My wife, Musammat Bishan Devi, may manage the said property in whatever way she likes. She shall have all kinds of powers to deal with the property aforesaid. She shall be considered full owner. So long as Malik Arjan Singh is alive, he will manage the land in Lyallpur.

7. After the death of my wife, Musammat Bishan Devi, whatever property remains shall be owned by the sons of Sundar Singh. Sundar Singh shall have no connection or concern therewith. Besides, my wife, Musammat Bishan Devi, shall not be entitled to sell immoveable property. The sons of Sundar Singh shall also have no such right.

8. The remaining moveable or immoveable property of mine shall be exclusively owned by my wife, Musammat Bishan Devi.

Mutation of the lands at Lyallpur into the name of Bishan Devi was obtained from the Colonisation Officer on 13th March, 1907, but the entry was restricted by the condition "so long as she is alive and does not remarry." This was in accord with the customary law of the parties independently of her husband's will. On the 12th November, 1906, Sundar Singh filed a plaint in the Court of the District Judge, Peshawar, against Bishan Devi and other defendants. By this plaint as amended he claimed a declaration that the will of Ishar Singh was not valid or binding on him as regards (*inter alia*) the immoveables at Mahal Nathe and Nowshahra, or the stock of liquor and opium, etc., at Peshawar or the Government Promissory Notes for Rs. 13,000 in deposit at the Treasury, Peshawar. The sole relief claimed was a declaration and the suit was brought upon a Court fee of Rs. 10 only, though valued for purposes of jurisdiction at over Rs. 26,000. The case made was that the business of dealers in intoxicants, etc., under excise licences was not the separate business of Ishar Singh but a joint family business which had been carried on by him jointly with his brothers and after their deaths with the plaintiff Sundar Singh, and that all the properties had been acquired out of the joint funds of the business. Sundar Singh claimed to be the sole heir to and possessor of the property

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above mentioned and sued for a declaration "that the will is unlawful and null and void and has no effect upon the rights of the plaintiff who holds proprietary possession over the property in question." The plaint stated that "a separate suit will be brought for recovery of the ornaments, valued at Rs. 15,000, other moveable property and lands situate at Lyallpur which are in possession of the defendants."

This suit was compromised in June, 1907, and as the validity and effect of the compromise is now in question it becomes necessary to notice it in detail. On the 9th June a petition to the Court of the District Judge was signed by Bishan Devi and by Sundar Singh. It set forth that the parties had made the settlement therein expressed and it concluded "hence this application by way of a compromise is submitted with the prayer that it may be accepted and the case decided in terms thereof." The main terms were that the lands at Mahal Nathe and at Lyallpur should belong to Bishan Devi for her life and on her death to Sundar Singh and his male descendants. An iron safe, a cow and a calf were to belong to Bishan Devi. Sundar Singh was to pay her Rs. 8,150 in cash. Government Promissory Notes to the value of Rs. 13,000 deposited in the Treasury were to be entered in the names of the sons of Sundar Singh. Bishan Devi was to be absolute owner of all ornaments, clothes and other moveables in her possession. Sundar Singh was to get the book-debts, stock-in-trade and other trade moveables and to be liable to pay any debts of Ishar Singh. The petition of compromise was signed at Rawalpindi and was handed over to one Mohan Singh, an honorary magistrate, who sent it by post to the District Judge. On 11th June the case came on before the District Judge and Bishan Devi was represented by her agent Jagat Singh and by a pleader. Sundar Singh was present in person. As appears by the note of the District Judge, Jagat Singh stated to the Court :—

Musammat Bishan Devi signed the compromise in my presence but she subsequently stated that she only accepted it if the Rs. 8,150 was paid at once and if the Rs. 13,000 was invested in a bank. She signed of her own free will knowing the contents of the deed.

By his decree the District Judge "ordered that a decree be and the same is hereby passed on the terms and under the conditions embodied in the deed of compromise dated 9th June, 1907, as a whole with this reservation that the sum of Rs. 8,150 shall be paid into Court within fifteen days from to-day, in case of failure defen-

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dant 1 (Bishan Devi) to be entitled to recover that amount by execution."

On some date between 26th June and 15th July, 1907, an application for execution was filed by Jagat Singh on behalf of Bishan Devi against Sundar Singh asking that a sum of Rs. 7,535 lying in the Treasury on account of Ishar Singh be paid to Bishan Devi on account of the sum of Rs. 8,150 due to her under the compromise. This application was successful and on 15th July a receipt was given by Jagat Singh on the lady's behalf for Rs. 7,535 received through Court. Other instances of action taken under the compromise are in evidence but need not here be referred to.

The gifts made on 7th February, 1929, by Bishan Devi to the first and second respondents of the lands at Lyallpur are contrary to the terms of the compromise of June, 1907, whereby these lands were to belong to her for her lifetime only and she was not to be competent to alienate them. Hence the present suit brought by sons of Sundar Singh on 7th August, 1933. The defence of Bishan Devi (original defendant No. 1) was that she was *purdanashin*, that she signed a blank paper and not the completed deed of compromise, that her signature was obtained by undue pressure and without independent advice, and that she never agreed to the compromise. She contended further that the compromise could not be put in evidence for want of registration and that the Court at Peshawar was not competent to pass the compromise decree. Other contentions need not now be referred to.

It was maintained for the plaintiffs that the will of Ishar Singh gave to his widow a life interest and no more, and that the plaintiffs were entitled as his nearest reversioners to the declaration which they sought independently of the compromise.

The learned Subordinate Judge dealt with a number of questions which are no longer in dispute. He found *(inter alia)* that the land at Lyallpur was Ishar Singh's and not his wife's, that the business in which he was engaged was his separate business and not a joint family business, that Sangat Singh (respondent No. 1) was not adopted by him. But in the High Court the issues were narrowed to three questions only, (1) whether by her husband's will Bishan Devi got an absolute interest in the Lyallpur lands, (2) whether the compromise was brought about by coercion and undue influence or whether she signed the deed after fully understanding its contents, (3) whether the deed was inadmissible in evidence for want of registration.

On the question as to the true construction of the will of Ishar

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Singh the trial Court and the High Court were agreed in holding that its effect was to make Bishan Devi absolute owner of the Lyallpur property. Their Lordships are of the same opinion. The prohibition against selling the immoveables is not addressed to the widow only but is extended to the sons of Sundar Singh under clause 7, and is not in their Lordships' view to be regarded as showing an intention to give to the widow an interest for life or the estate of a Hindu woman, but as a condition which the testator was proposing to attach to an absolute interest. Clause 4 is in clear and emphatic language, consistent only with the gift of an absolute interest, and the phrase "whatever property remains" in the first part of clause 7 of the will is in keeping with this intention. The prohibition against selling must be disregarded as repugnant to the absolute gift to Bishan Devi. Clause 8 is a residuary clause which does not affect the land at Lyallpur.

It is therefore necessary for the plaintiffs appellants to rely upon the compromise of June, 1907. The learned Subordinate Judge held that the deed was admissible in evidence; that the compromise was entered into by Bishan Devi with knowledge of its contents and voluntarily; and that the case of coercion and undue influence was untrue. The learned Judges of the High Court have held that the deed is inadmissible for want of registration and that it has not been established that it was read over to her or that she signed it after fully understanding its meaning or effect. They do not appear to hold that coercion or undue influence has been proved. At the root of their judgment is an opinion formed by them to the effect that by not including in the suit of 1906 a claim to recover possession of the Lyallpur lands Sundar Singh had forfeited all right therein by virtue of Order 2 Rule 2 Civil Procedure Code (section 43 of the Code of 1882). They are mistaken in supposing that the claim to Rs. 13,000 Government Promissory Notes and to the land at Nowshahra was not included in the suit. The plaint was on the footing that Sundar Singh was in possession of these and other items and required only a declaration to clear his title; whereas the land at Lyallpur and the ornaments were in Bishan Devi's possession and the claim to them must necessarily be put as a claim to recover possession. In these circumstances their Lordships cannot agree with the High Court in regarding the compromise as bad by reason that Bishan Devi was not advised that she could safely treat the claim of Sundar Singh to the Lyallpur lands as barred. On the contrary, such advice had it been given, would in their Lordships' view have been rash rather than sound.

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The lands at Lyallpur being situate in the Punjab, outside the district of Peshawar, a claim to relief in respect of them could have been entertained by the District Judge under section 19 of the Code of 1882. The High Court would seem to have assumed that section 19 was not merely permissive : also that the claim to recover possession of the Lyallpur lands and the claim to a declaration as regards the other lands were claims in respect of the same cause of action [cf. *Payana* v. *Pana Lana* (1)]. Their Lordships think that both assumptions are highly debateable. But in any case the claim of the present appellants as reversioners of Ishar Singh would not have been barred so far as regards the question whether Ishar Singh's will gave to his widow an absolute interest or an interest for her life. Moreover, so long as the suit of 1906 was undisposed of, it was always possible that the Court, if it thought that there was anything in the point as to Order 2, Rule 2, would give leave to the plaintiff to amend by including a claim to recover possession of the ornaments and Lyallpur lands. It does not appear that the lawyers advising Bishan Devi thought anything of the point now taken by the High Court and with all respect to the learned Judges their Lordships cannot regard it as a good one.

By the decree of 11th June, 1907, the District Judge had purported to direct that the terms of the compromise should be carried out as a whole. He had not in terms excluded the Lyallpur land from the operative part of the decree and he had not recited the contents of the deed. Though it is clear that his decree was made upon the petition and that both documents would become part of the same record, he had neither marked and exhibited the deed nor scheduled it or a copy of it to the decree. He had referred to the deed by date and in a manner which has given rise to no doubt or difficulty. No proceedings were taken at any time during the next 20 years for having the decree set aside whether on the ground of some defect in the agreement of compromise or some error or irregularity in the decree itself. On the contrary the decree was enforced as to one of the terms of the compromise by execution proceedings taken on behalf of Bishan Devi : and it may well be a question whether after taking this advantage under the decree she would have been entitled in equity to have the decree set aside. Under the Registration Act (III of 1877) no question of registration arises as regards decrees [section 17 (i)]. In these circumstances their Lordships agree with the argument of Sir Hari Singh Gour on behalf of the

(1) (1914) L. R. 41 I. A. 142.

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appellants that the first question is one of jurisdiction in the strict sense of the term. Had the learned District Judge at Peshawar jurisdiction to pass this decree as regards the lands at Lyallpur or is his decree so far as regards these lands a nullity which Bishan Devi was entitled to disregard without taking any proceedings to have it set aside or varied? As the learned Judges of the High Court thought that the claim to the Lyallpur lands came within Order 2, Rule 2, they must have considered that this claim was within the jurisdiction of the District Judge. In any case when it was agreed that Bishan Devi should have the Lyallpur lands for her life, there was no doubt or difficulty as to the jurisdiction of the District Judge of Peshawar to include these lands within the declaration made as to the other lands and assets. It was no longer a question of a decree for possession but merely of a judicial determination as to the reversionary rights of Sundar Singh or his descendants. Whether the District Judge acted irregularly and failed to comply strictly with section 375 of the Civil Procedure Code of 1882 matters nothing. He acted by consent and within his jurisdiction; his decree was enforced in execution by Bishan Devi and no proceedings have at any time been taken to have it set aside. He might have acted more strictly in compliance with the terms of section 375 had he first amended the plaint by including the reversionary interest in the Lyallpur lands within the declaration sought, but the mere fact that he could have done so shows that he was not devoid of jurisdiction.

In these circumstances it is clear that in 1928 Bishan Devi was not entitled to treat as a nullity this judicial determination to the effect that she had only a life interest in the lands at Lyallpur.

Their Lordships, considering the compromise of 1907 (as the Courts in India have considered it) as a contract, are further of opinion that it was valid and binding upon Bishan Devi. The learned Judges of the High Court held that the District Judge had not acted correctly under Order 23, Rule 3, Civil Procedure Code (meaning section 375 of the Code of 1882) and had not ordered the compromise to be recorded. Their Lordships have already noticed that the decree directs effect to be given to the whole compromise and have dealt with the position so created. But in any view the decree in their Lordships' opinion recorded the compromise though the compromise was not recited textually either in the body of the decree or in a schedule thereto. In *Hemanta Kumari* v. *Midnapur Zemindary Co., Ltd.* (1) the Board

(1) (1919) L. R. 46 I. A. 240; I. L. R. 47 Calc. 485; 31 C. L. J. 298.

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was careful to avoid laying down any methed of compliance with section 375 of the Code of 1882 as the only method. Lord Buckmaster was at pains to say that "their Lordships are not aware of the exact system by which documents are recorded in the Courts in India", and it was not intended by pointing out one "perfectly proper and effectual method" to alter or nullify the rights of parties which for many years past had depended on the previous Indian practice being treated as valid. That section 375 was sufficiently complied with by a reference to the compromise being made in the decree appears from the judgment delivered by Lord Watson on behalf of the Board in *Pranal Annee* v. *Lakshmi Annee* (1), where it was said that "the order of the learned Judge, if it had referred to or narrated these terms of compromise, would have been judicial evidence, available to the appellant, that the respondents had agreed to transfer to her the moiety of the land now in dispute." (See also *Hemanta Kumari's* case (2) (*supra*) at P. 247 of the report.)

The only remaining question is whether Bishan Devi entered into the compromise voluntarily and with understanding of its effect. It does not appear that she was *purdanashin* in the strictest sense, and her evidence is that of an intelligent woman. She took the benefit of the compromise and acted on it for many years before repudiating it. As she not only got rid of the claim of Sundar Singh to be sole owner of her husband's lands and other assets, but enforced one of the terms of the compromise against him, there is more than sufficient *prima facie* evidence that she understood the transaction. It is satisfactorily proved that the terms of the compromise were settled after much haggling in the course of which Jagat Singh conveyed her instructions to the retired District Judge, Bhagat Narain Das, who was acting as conciliator between the parties and who witnessed her signature to the petition of compromise.

The case that she signed a blank paper is, in their Lordships' opinion, disproved. They reject as worthless the evidence of Jagat Singh on this point and also the evidence to the effect that she was brought to agree by his threat to cease acting for her in the suit. The allegation that undue pressure was brought upon her by certain members of the *baradri* (brotherhood) is the only matter which requires serious consideration upon this part of the case. It is said that she was told that certain members of the family would not take part in the marriage ceremonies of her sister's son,

(1) (1899) L. R. 26 I. A. 101 (106); I. L. R. 22 Mad. 508 (514).

(2) (1919) L. R. 46 I. A. 240 (247); I. L. R. 47 Calc. 485; 31 C. L. J. 298 (303).

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Nidhan Singh (brother of Jagat Singh), unless she compromised with Sundar Singh. But as the Subordinate Judge noticed there is no reason to think that this threat if made would have greatly troubled Bishan Devi. Her own evidence is that she said at the time that she did not care and that "if they would not let the marriage take place let them do so." The learned Judges of the High Court do not appear to find that undue influence was used but proceed upon the view that Bishan Devi is not proved to have understood the compromise or to have voluntarily entered into it. After 20 years and more, when Bhagat Narain Das is dead, direct oral evidence of the explanation of the petition can hardly be expected. The High Court, largely because of the argument as to the effect of Order 2, Rule 2, on the lands at Lyallpur, thought that the compromise was one-sided. Also they mistakenly thought that the sum of Rs. 8,150 was to be paid to Bishan Devi out of the Rs. 13,000 (which is not the case of either party). The Rs. 13,000 consisted of Government Promissory Notes which were to be put in the name of the sons of Sundar Singh, and the sum of Rs. 7,535 realised in execution was a different matter. Their Lordships agree with the trial Judge in holding that Bishan Devi entered into the compromise voluntarily. She appears to have been surrounded with legal advisers and in Bhagat Narain Das, admittedly a man of high standing and good reputation, had a family friend specially competent to give her sound and practical advice.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, that the decree of the High Court should be set aside and the decree of the Subordinate Judge restored. The first and second respondents will pay the appellant's costs in the High Court and of this appeal.

Hy. S. L. Polak & Co.: Attorneys for the Appellants.

T. L. Wilson & Co.: Attorneys for the Respondents.

A. T. M. *Appeal allowed.*

PRESENT : *Lord Thankerton, Lord Romer, Sir George Rankin, Lord Justice Luxmoore and Mr. M. R. Jayakar.*

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HEM CHANDRA ROY CHAUDHURY

v.

SURADHANI DEBYA CHAUDHURANI AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.]

Purdanashin lady—Deed—Technical detail—Intelligent comprehension of bargain—Beneficiary, interest of.

A purdanashin lady is not required to understand every technical detail of a bargain.

Though there may not be a clear understanding of each detail of a matter which may be greatly involved in technicalities there may still be an intelligent comprehension of the bargain on the part of the lady. In such a case the bargain is good and is good as a whole. But if a feature of the transaction affecting in a high degree the expediency of her entering into it is not understood by the lady the bargain cannot be divided into parts or otherwise reformed by the Courts so as to uphold certain portions of it while rejecting others. Her answer to a suit upon the deed is not that she has an equitable defence to the enforcement of a certain stipulation but that it is not her deed. The protection extended to a person in her situation is protection against being held bound by a transaction which never had her free and intelligent consent.

A beneficiary under a trust can deal with his interest by way of mortgage, though such an interest is not technically regarded in India as an equitable estate.

Privy Council Appeal No. 80 of 1938 by the Defendant Mortgagor.

The material facts appear from the judgment of their Lordships.

S. P. Khambatta for the Appellant.

C. Bagram for the Respondents.

Their Lordships' judgment was delivered by :

May, 23.

Sir George Rankin : The appellant, Hem Chandra Roy Chaudhury, was the first defendant in a suit brought by the first respondent in the Court of the Subordinate Judge at Mymensingh to enforce a mortgage. The suit was filed on the 6th March, 1931, and the mortgage deed (exhibit 1) was dated 18th August, 1918. The property mortgaged thereby was a taluk (Gangaram Rai) numbered 237 in the books of the Mymensingh Collectorate and comprising ten mouzas ; also another taluk (Sambhu Chandra

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Roy) numbered 239 in the same Collectorate and comprising seven mouzas. The mortgage deed had been executed in favour of the plaintiff by two persons as mortgagors—the appellant and his paternal grandmother, an old lady whose name was Sm. Nabin Kishore Chaudhurani.

The appellant had inherited the mortgaged properties, together with other properties, from his father at some date before 1914 while he was yet a minor. The father's will, made in 1891, states that Nabin Kishore, the testator's adoptive mother, had managed and administered his zemindari and other properties during his minority and was efficient in doing all business relating thereto. The appellant in 1913, on attaining majority, executed a trust deed (3rd Falgoon 1320 B. S.) vesting all his properties in her so that she might continue to manage them. Between 1914 and 1917 they had jointly borrowed considerable sums from the Maharaja of Mymensingh on four mortgage deeds. The first of these mortgages dated in 1914 was paid off by money raised from one Anath Bandhu Guha by means of a mortgage (exhibit S) entered into on 18th March, 1918, a few months before the mortgage in suit. The other three mortgages were paid off by means of the mortgage in suit which was for the sum of Rs. 1,20,000,—Rs. 1,00,423-4-6 due on the three mortgages already mentioned, Rs. 4,000 due on a note of hand to the plaintiff (respondent No. 1) and Rs. 15,576-11-6 cash advanced. The appellant and his grandmother in 1920 and 1923 had borrowed further sums from Anath Bandhu Guha under two mortgage deeds exhibits R and T.

The properties comprised in the respective mortgages to Anath Bandhu Guha were as follows. His prior mortgage of 18th March, 1918, (exhibit S) comprised four out of the seventeen mouzas mortgaged to the plaintiff. His subsequent mortgage of 1920 (exhibit R) comprised the same seventeen mouzas and his last mortgage of 1923 (exhibit T) comprised in addition to these seventeen mauzas a house and lands known as Bailor House.

Anath had died before suit and the present respondents 2 to 5 were impleaded as his representatives. They were defendants 3 to 6 and may be referred to as the Guha defendants.

Nabin Kishore was impleaded as the second defendant in the suit. She died on 8th September, 1932, before the trial and the appellant was substituted in her place on 13th September, 1932. The time originally allowed by the Subordinate Judge to the defendants for filing written statements was extended by him until 4th June, 1931, on which day the Guha defendants put in

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a written statement. The appellant was given further time until the 25th. On that day he asked for still more time. The Subordinate Judge gave him two days only, remarking that he had had two and a half months already ; also that he had no right to look into the Guha defendants' written statement before filing his own. (This may have meant no more than that he should file his own written statement independently in the first instance.) On the 29th June, Nabin Kishore filed her written statement and on the 6th of July the Guha defendants filed an amended pleading in which for the first time they sought to have their prior and subsequent mortgages enforced in the plaintiff's suit. On the 18th July issues were framed, including an issue as to the sums due on the respective mortgages in favour of the plaintiff and of the Guha defendants. On 29th August an issue, not now of importance, was amended at the instance of Nabin Kishore. After her death in September, 1932, the appellant, who had filed no written statement on his own account, asked leave on 1st November, 1932, to file a new written statement as her representative. He was given leave, but as he applied late, leave was only given on the terms that he could take no fresh ground of defence apart from those already raised by her previous written statement. He filed a written statement on 14th November, 1932, of which paragraphs 5 to 7 setting up an interest of third parties in the mortgaged property was struck out by order of 19th November.

The first and main contention of the appellant throughout has been that Nabin Kishore was a Purdanashin lady, that the mortgage deed sued upon was not explained to her, and that for this reason the mortgage is invalid even against him. Both Courts in India held on very convincing evidence that though an old lady, Nabin Kishore had considerable capacity for business ; that the deed was read over to her, though it was not explained ; that she understood its effect except that she did not understand that she was making herself personally liable to repay the money borrowed from the plaintiff. Neither Court in India appears to have appreciated that if for want of explanation the lady did not understand an important feature of the transaction, it cannot be held that her mind and free consent went with her act in executing the deed. A Purdanashin woman is not required to understand every technical detail of a bargain. In the judgment of the Board delivered by Lord Buckmaster in *Sunitabala Debi* v. *Dhara Sundari Debi Chowdhurani* (1),

(1) (1919) L. R. 46 I. A. 272 (278).

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this is pointed out and the "proper and necessary test" was held to have been applied by the Subordinate Judge who had found "that the lady had sufficient intelligence to understand the relevant and important matters, that she did understand them as they were explained to her, that nothing was concealed and that there was no undue influence or misrepresensation." And in *Farid-un-nisa v. Mukhtar Ahmad* (2), the Board stated the requirement as being "that the disposition made must be substantially understood and must really be the mental act as its execution is the physical act of the person who makes it." Though there may not be "a clear understanding of each detail of a matter which may be greatly involved in technicalities"—to use Lord Buckmaster's words—there may still be an intelligent comprehension of the bargain on the part of the lady. In such a câse the bargain is good and is good as a whole. But if a feature of the transaction affecting in a high degree the expediency of her entering into it is not understood by the lady the bargain cannot be divided into parts or otherwise reformed by the Courts so as to uphold certain portions of it while rejecting others. Her answer to a suit upon the deed is not that she has an equitable defence to the enforcement of a certain stipulation but that it is not her deed. The protection extended to a person in her situation is protection against being held bound by a transaction which never had her free and intelligent consent.

Their Lordships must accept the concurrent finding of the Indian Courts that the lady did not understand that she was incurring personal liability for the loan and on this view must dispose of the case on the footing that the mortgage deed did not bind her at all. What defence is that to the appellant? That he had the beneficial interest in the property is agreed, though the trust deed of 1913 is not before the Board. He was competent to mortgage his interest. No doctrine of the law of India has been indicated to their Lordships which prevents a beneficiary under a trust from dealing with his interest by way of mortgage, though it is true enough that in India such an interest is not technically regarded as an equitable estate. If Nabin Kishore had a life interest in one of the villages, as she would appear from her son's will to have had under her husband's permission to adopt, that in no way affects the present suit. The life interest has come to an end.

(1) (1925) L. R. 52 I. A. 344 (350); I. L. R. 47 All. 703; 42 C. L. J. 531 (539).

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The mortgage is not being enforced against it, but is good and enforceable against the appellant's interest in the village—an interest which came to him as his father's heir, though subject, it may be, to certain life interests outstanding in his father's mother and widows. The plaintiff's mortgage is plainly enforceable against the appellant, whose defence is neither honest nor substantial.

The only other question raised by the appeal has reference to the relief granted to the Guha defendants in respect of their subsequent mortgages of 1920 and 1923 (exhibits R and T). No relief whatever was given to them in respect of their prior mortgage of 18th March, 1918, (exhibit S) and no personal decree was given to them in respect of either of the subsequent mortgages. Under Order 34, rule 4, clause 4 of the Civil Procedure Code, they were at least entitled to redeem the plaintiff or to receive their own mortgage money under exhibits R and T out of the surplus sale proceeds remaining after satisfaction of the plaintiff's mortgage. If they pay off the plaintiff they become entitled to apply for a final decree for sale in the plaintiff's stead. They have been given this relief and nothing more. The appellant claims to have a grievance that some objection to the validity of these subsequent mortgages was taken by him, but has not been tried. But their Lordships have not succeeded in ascertaining the nature of the objection which requires still to be tried. The execution of the deeds is not disputed, there is no ground for objecting to the rate of interest, the sums due upon the deeds have been enquired into and ascertained. The trial Judge rightly refused to allow the appellant to set up the interest of his father's widows and the decree will not bind them. The appellant has not shown to their Lordships any ground for dissatisfaction with the orders of the trial Judge upon his belated written statement of November, 1932—orders which have been already detailed in this judgment. On this part of the case also the appeal must fail.

Their Lordships will humbly advise His Majesty that this appeal be dismissed. The appellant will pay the costs of respondent No. 1.

T. L. Wilson & Co.: Solicitors for the Appellant.

W. W. Box. & Co.: Solicitors for the Respondents.

A. T. M. & R. C. C. *Appeal dismissed.*

APPELLATE CIVIL.

Before Mr. Justice R. C. Mitter, and Mr. Justice A. S. M. Akram.

RAJA KIRTANAND SINGH BAHADUR, AND ON HIS DEATH HIS HEIR AND LEGAL REPRESENTATIVES RANI PROVABATI SAHEBA AND OTHERS

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May. 6, 7, 8, 9, 10. June, 6.

v.

SECRETARY OF STATE FOR INDIA IN COUNCIL.*

Several fishery—Burden of proof—Right of Crown to grant several fishery to private individual—Extent of grant actually made by Crown—Findings in the judgment not inter partes, *if admissible.*

The burden of proof is on the person in possession of Jalkar to show that the Jalkar formed part of the assets of the Zemindari at the time of the Permanent Settlement.

Forbes v. *Meer Maho med Hossein* (1) followed.

As to the right of Crown to grant a several fishery to a private individual, in India there is no limitation in respect of time and the river need not be tidal ; it is enough if it is navigable.

Raja Sreenath Roy v. *Dinobandhu Sen* (2) followed.

The Crown can divide the rights in land and make a grant of the right to fish as an incorporeal right, apart from the right to the subjacent soil, in the waters covering the land to one, and either reserve to himself or grant to another the subjacent soil.

Kooroonamoye Chowdrain v. *Joy Sunker Chowdhry* (3) and *Hori Das Mal* v. *Mahomed Jaki* (4) referred to

The judgment not being *inter partes,* the findings in it are inadmissible in evidence.

Govinda Narayan Singh v. *Shamlal Singh* (5) followed.

Appeal by Defendants Nos. 1 to 3.

Suit for recovery of 9 Jalkars.

The material facts appear from the judgment.

*Appeal from Original Decree No. 250 of 1935, against the decree of Hem Chandra Sanyal, Esq., Additional Subordinate Judge of Malda, dated the 31st July, 1935.

(1) (1873) 20 W. R. 44 (P. C.) 12 B. L. R. 210 (P. C).
(2) (1914) L. R. 41 I. A. 221 ; I. L. R. 42 Calc. 489 ; 20 C. L. J. 385.
(3) (1864) W. R. 267.
(4) (1885) I. L. R. 11 Calc. 434 (F. B).
(5) (1931) L. R. 58 I. A. 125 ; 53 C. L. J. 333.

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Messrs. S. N. Banerji, Gopendra Nath Das and *Sambhu Nath Banerji* for the Appellants.

Messrs. Rama Prosad Mukhopadhyay, Subodh Chandra Basak, Ranjit Acharja Chowdhury and *Muktipada Chatterji* for the Respondent.

C. A. V.

The following judgment was delivered :

June, 6.

This appeal is by defendants Nos. 1 to 3 in a suit instituted by the Secretary of State for India in Council on the 27th March, 1929, for recovery of nine Jalkars or Fisheries. They are known as (1) Patalchandi, (2) Nimajole, (3) Chandmari (4) Gangaprosad, (5) Mayamari, (6) Goaltuli, (7) Laldhubri (8) Tulsiganga. The ninth Jalkar is over a portion of the river Bhagirathi which for brevity's sake will hereafter be called by the name of Ganga-Bhagirathi or Bhagirathi simply. At the trial the plaintiff gave up his claim to Goaltuli and Laldhubri on the admission that they are no longer fisheries, being now dry lands. Tulsiganga is a long narrow channel, but the remaining five Jalkars are in beels or almost land locked waters connected by narrow channels or *daras* with the river Bhagirathi, except Mayamari which is connected with another river called Pagla. The plaintiff claims the exclusive right to fish not only the *beels* but also in some of those connecting channels or *daras*.

There were five defendants to the suit. The first three are the proprietors of eight annas share and the last two of the remaining eight annas share in a zemindary known as Perganah Ekbarabad formerly Touzi No. 1937 of the Purneah Collectorate, now No. 65 of the Maldah Collectorate, which was permanently settled with their predecessor-in-interest Raja Vedananda Singh Bahadur on the 16th June, 1819, under Regulation I of 1793. Before the said permanent settlement the said Pergunnah appears to have been settled successively for terms of five years with Maharaja Radha Nath of Dinajpore and others till 1809 when the Decennial Settlement was concluded with Dular Singh Choudhury under Regulation VIII of 1793. The sites of the aforesaid five *beels*, Patalchandi etc. are within the geographical limits of their Zemindary Pergunnah Ekbarabad and the channel Tulsiganga and the material portion of the river Bhagirathi, which is not navigable at all seasons of the year, also flows through their Zemindary. The learned Subordinate Judge passed a decree in favour of the plaintiff in respect of the seven Jalkars, the claim

to Goaltuli and Laldhubri having been as we have already stated, abandoned by the plaintiff. The fourth and the fifth defendants have not appealed.

A several fishery known as "Pergunah Gangapat Islampore" was granted by Nawab Alivardi Khan, a Mohamedan ruler of Bengal in pre-British times, to the grand-mother of one Hoolaus Chand. This grant was confirmed by Nawab Mohabat Jung in favour of Hoolaus Chand's father Bhagmal. Before 1789 the Government gave *talooki* settlement to Hoolaus Chand, i. e. settlement on the basis that he was the proprietor. When the question of Decennial Settlement under Regulation VIII of 1793 was being considered, the Collector wrote a letter on the 2nd October, 1789, to the President and Members of the Board of Revenue (Ex. Q. B. 1 *) to the effect that 'Hoolaus Chand was not really a *talookdar* but a subordinate tenure-holder under the Zemindars of Conkjole. The Board of Revenue, however, directed the Collector to conclude the Decennial Settlement with him with the reservation that in case the Zemindars of Conkjole establish their claim within six months the settlement to Hoolaus Chand will be nullified and settlement would be made with the former. By a document dated the 15th November, 1790, the Decennial Settlement of the Jalkar "Pergunah Gangapat Islampore," was concluded with Hoolaus Chand, [Ex. C (1) B. 4.] from 1197 to 1206 B. S. and the Zemindars of Conkjole not having preferred thereafter any claim to have settlement of the said Mehal, the permanent settlement under Regulation 1 of 1793 was concluded with Hoolaus Chand from 1207, at an annual revenue of Rs. 3048-7-8-1 (sicca). On the 1st January, 1800, Hoolaus Chand executed the Permanent Settlement Kabuliat (Ex. C ; B42). In the Decennial and Permanent Settlement Kabuliats no detailed specification of the Jalkar was given, save and except that it was described by the name "Jalkar Pergunah Gangapat Islampore". It is admitted in the case that an exclusive right of fishery was granted by the Crown to Hoolaus Chand over waters which then went by the name of Pergunah Gangapat Islampore. There is also no controversy that the said right was conferred on him on the waters of the navigable stream of the Ganges from the upstream limit at Pointy to the down stream limit at Sooty. Both these

* We have marked the paper books thus :
Part I as A.
Part II Vol. I as B and
Part II Vol. 2 as C.

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villages are shown in the map prepared by Major Rennel between 1767 to 1772 [Ex. 6 (c)—Map No. 8]. The controversy is as to whether the said Jalkar covers waters claimed in the suit which are not in the bed of the navigable river Ganges.

There can be no doubt that fisheries situated within the geographical limits of Pergunah Ekbarabad which had been granted by the Crown to others as incorporeal rights before the Decennial Settlement of that Pergunah, had not been included in the assets of Zemindary of Pergunah Ekbarabad at the time of the Permanent Settlement. The Decennial and Permanent Settlement Kabuliats [Ex. C 13 (a)—B 60 and Ex. C 4 (a); B 64] exclude all *sairats* from the settlement. The word *sairat* includes profits from fisheries (Wilson's Glossary p. 454). The Zemindar of Pergunah Ekbarabad had therefore the right to fish only in those lands covered with water within the limits of his Pergunah, and that only as an incident to his ownership of those lands, the incorporeal right to fish in which had not been granted before by the Crown to others. The fisheries mentioned in the returns, Called Tahut Milani papers, (Ex. B; B6-21) made by the Zemindar of Pergunah Ekbarabad in the year 1793-4 cannot be taken to include any of the extensive fisheries in suit. The two Jalkar Mehals mentioned in those returns are very small, the assets of one being Rs. 29/8/0 and the other Rs. 37/8/0. The Jalkars in suit cannot be taken to have been included in the defendants' Zemindary as the assets thereof were not taken into account in settling Pergunah Ekbarabad with their predecessor. *Forbes* v. *Meer Mahomed Hossein* (1). Still plaintiff cannot succeed unless he can establish his right in them by showing that they are included in Jalkar "Pergunah Gangapat Islampore." Before we take up this question the nature of the waters in which the right to fish is claimed by the plaintiff and the history of Jalkar "Pergunah Gangapat Islampore" must be noticed.

In 1767-1772 the river Bhagirathi (called Bagrutty river in Rennel's map) branched off from the river Ganges from a point near the village Sumdah below Pointy and again joined the river Ganges at a point near Sooty. Its course is shown in Rennel's map Ex. 6 (c)—Map No. 8. The Revenue Survey Maps of 1847-48 have not been produced, but in Sheets Nos. 6 & 7 of the Revenue Survey Map of 1880 [Ex. 6 (a) and Ex. 6 (b) Maps 6 & 7] the position of the river Bhagirathi and of the old bed of the river Ganges in 1847-48 are indicated. These maps show that

(1) (1873) 20 W. R. 44 P. C. 12 B. L. R. 210.

the river Bhagirathi branched off in 1847-48 from the river Ganges at a point just below Ganga Govindapore, joined another branch of river Ganges called Pagla, which joined the river Ganges again below Chandpur. Both Rennel's map and these Revenue Survey Maps indicate that the both ends of the River Bhagirathi were open in 1767-72 and also in 1847-48. The nature and position of the river Bhagirathi with reference to the river Ganges about the year 1880 can be reasonably ascertained by placing together the Revenue Survey map sheets Nos. 1, 6 and 7 [Ext. H (62), Ex. 6 (a) and Ex. 6 (b)—Maps 60, 6 &7]. A channel, [which is named Morganga (dead channel of river) in Sheet No. 6] issued out of the river Ganges from a point a little to the south of Rahimpur (near figure 6) marked in Sheet No. 1. The northern end of the river Bhagirathi issued from this dead channel at a place south of Ganga Govindapur marked in Sheet No. 6. It joined the river Pagla at a place near Lalbazar Silk factory. From that place it and the Pagla flowed through a common bed up to Chandpore, where it separated again It flowed in a westerly course and again joined the river Ganges at Jagarnathpur—Kidderpore, the Pagla taking the easterly channel and joining the Ganges further east near Turtipore Indigo Factory marked in Sheet No. 7. From these maps it appears that about 1880 its northern mouth was closed except during the rainy season, but the southern mouth was connected with the river Ganges at all seasons of the year. The evidence on the record establishes that its condition is similar now. At the north waters of the river Ganges enter Bhagirathi only for about three months during the rainy season, but the southern end is connected with the river Ganges all the year round. It is not navigable for nine months of the year but during the rainy season boats of moderate sizes can pass. Portion of the river Bhagirathi from Sadullapore to Belbari Ghat is the subject matter of the suit (Plaint Map—Map No. 2).

Tulsiganga is a narrow and shallow channel issuing out of the Pagla river and falling into the Bhagirathi river. The flow is perennial. The other five waters, Patalchandi, Nimagola, Chandmari, Gangaprosad and Mayamari are large sheets of inland waters in the nature of *beels* which do not completely dry up at any part of the year. The first four are connected by small channels or *daras* with the Bhagirathi river and the last with the Pagla river. These *daras* are not artificial channels excavated by human agency. An attempt was made by the defendants to establish that they were artificial channels, but the evidence on the

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point is insufficient to establish that fact. They are natural channels existing for a long time, as far as memory goes. They are, however, narrow and shallow channels. They dry up for nine months or so in the year and during those nine months there is no flow of the waters of Bhagirathi or the Pagla river into those *beels*. During the rainy season, however, the *daras* are filled up with water and through the *beels* receive the waters of the Bhagirathi or the Pagla river as the case may be. The Commissioner has noted the details in his report which we accept as representing the true state of things. The *beels* and the connecting *daras* are shown in the Commissioner's map (Map No 3).

The Jalkar under the designation of "Pergunah Gangapat Islampore" was permanently settled, as we have already stated, with Hoclaus Chand in the year 1800. It was sold at a revenue sale in the year 1805 or 1806 and purchased by the Government. It thus became a Government Khas Mehal from that year. Government granted short term ijaras upto 1823 or so at rents which were less than the amount of the revenue assessed upon it at the time of the Permanent Settlement. The reduction is explained in the letter of the commissioner of the Rajshahye Division dated the 14th September, 1855 [Ex (O2-B91)]. The reason given was that neighbouring Zemindars had appropriated parts of the Jalkar. In 1870 the Jalkar was divided into two portions by the Board of Revenne in its proceedings dated the 9th August of that year. The nothern portion, called Part I, was from Pointy upto the north of the Maldah—Rajmehal Road, and the southern portion, called Part II, was from the south of that road upto Shibgunj, Turtipore and Sooti. The southern portion was made into an independent Estate No, 557 of the Maldah Collectorate with an annual revenue of Rs. 1700 and cess Rs. 17. It was advertised for sale in the Calcutta Gazette of the 28th September, 1870, [Exs. I and I(1)—B126 to 129]. At the sale held on 5th November, 1870. Paresh Nath Bhagaban Chandra and Doman Chandra Shaha Chowdhury purchased it, their purchase taking effect from the 1st April. 1871, (Ex. E. B131). They continued as proprietors till about 1888 (there is no definite evidence about the exact date). The estate was then put up to sale for arrears of revenue and the Raja of Pakur purchased it. He however continued to be the proprietor for a short period, for he defaulted in paying revenue in 1892, with the result that the *mehal* was again put up to sale under Act XI of 1859 and was purchased by the Government on the 4th November, 1892. (Exhibit 2, B. 157). In this suit the Secretary of

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State claims exclusive Jalkar rights in the waters mentioned above as proprietor of Estate No. 557 of the Maldah Collectorate, basing his title on the aforesaid purchase at the revenue sale. In his plaint he admits that the defendants are in possession for the last 40 years. He states that Jalkar Gangapat Islampore (southern portion) comprises the main stream of the Ganges from Rajmehal to Turtipore together with all inlets and outlets, *dhapa* (expanse of low land), *damoshes* (pools of water in depressions), *koles* (remnants of river channel closed at one end), *sota* (small natural channel or water course), *morgangas* (bed of dead river) etc. situate within the two high banks of the Ganges as well as *jalas* (water) beyond the two banks of the river Ganges which are connected with the river Ganges during the substantial part of the year (paragraph 2). In paragraph 3 he expressly states that the waters described in the schedule to the plaint are component parts of Jalkar Gangapat Islampore. In paragraphs 4 and 5 he describes the nature of the waters described in the schedule by stating that the river Bhagirathi is connected at one end with the river Ganges throughout the year and at the other end only during the rainy season and the other waters are connected with it (the Bhagirathi) only during the rainy seasons. He makes the statement that the waters and fish of those Jalas are waters and fish of the river Ganges. He winds up these two paragraphs by again repeating that those waters are component parts of the Jalkar Gangapat Islampore. The statement in the plaint that the waters and fish of the Jalkars or Jalas in suit are the waters and fish of the main river Ganges have given the opportunity to the defendants appellants to raise interesting arguments. Mr. Banerjee appearing for them urges that the case of the plaintiff as made in the plaint, is that he has exclusive right to fish in the channel of the navigable stream Ganges from Rajmehal to Turtipore, and that he has also the exclusive right to fish in the waters described in the schedule to the plaint only because those waters are supplied with waters and fish by the river Ganges. He says, acccordingly, that the plaintiff can only succeed if those waters can be considered as adjuncts of the river Ganges; but they cannot be considered as adjuncts because the connection directly or indirectly with the Ganges is not throughout the year. We do not however construe the plaint in that manner. The plaintiff made the definite case that those waters are *component parts* of the Jalkar 'Gangapat Islampore'. He also pleaded further facts which in his opinion would support his case on the basis that the waters in question were parts of the same river system. It is not also his case

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that he had the exclusive right to fishing only in the river Ganges between Rajmehal and Turtipore and that the river has now or in the past had made the waters claimed in the suit as its own. These facts must in our judgment be kept clearly in sight in this case, and on them many of the decisions cited before us by both parties must be distinguished. Most of those decisions are noticed in the judgment of Lord Sumner in *Raja Sreenath Roy's* case (1). The cases cited before us are of five types :—

(1) Cases which define the *bed* of a river. A channel between two high banks may be very wide. Most part of it may be dry with narrow flows only or in the channel there may be isolated depressions covered with water during most part of the year, but during the rainy season the whole of the space may be covered with a mass of flowing water. *Ahmodi Begum* v. *Taraknath Ghose* (2) and possibly *Jogendra Narayan Roy* v. *Crawford* (3) and *Hurreeher Mookerjee* v. *Chundee Churn Dutt* (4) are cases of this type. The whole channel between the two high banks which are covered with flowing water during the rainy season would be regarded as the river bed and the person entitled to fish in the river would have the right to fish in all the waters stagnant or flowing left within these limits of the two high banks during the dry season as also in the whole of the moving waters from bank to bank at the time of the floods in the rainy season.

(2) Cases where a navigable river changes its course either gradually or suddenly and flows over a new bed which is also navigable. The grantee from the Crown who has the exclusive right to fish in the river would have the same right in the new channel though it may be over the lands of a private proprietor. *Tarini Churn Sinha* v. *Watson & Co.* (5) and *Raja Sreenath Roy* v. *Dinobandhu* (1) are cases of this type. The last mentioned case settled in favour of the grantee of Jalkar rights the conflict of decisions in Bengal when the change in the course of the river was sudden.

(3) Cases where the river overflowed its bank at times of flood and formed *beels* outside its banks. *Gopeenath Roy* v. *Ram Chunder Turklunkar* (6) and *Nubkishen Roy* v. *Uchchootenund Gosein* (7)

(1) (1914) L. R. 41 I. A. 221 ; I. L. R. 42 Calc. 489 ; 20 C. L. J. 385.
(2) (1913) 17 C. W. N. 1173.
(3) (1905) I. L. R. 32 Calc. 1141 ; 2 C. L. J. 569.
(4) (1858) S. D. 644.
(5) (1890) I. L. R. 17 Calc. 963.
(6) (1808) 1 Mac. Sel. Rep. 304 ; 2 Syv. 467 note.
(7) (1856) S. D. 878.

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are cases of this type. The right of the grantee who has the several fishery in the river does not extend to such beels unless they are perennially connected with the river channel.

(4) Cases where the river had left its old bed, flowed over a new bed for a time and then shifted again leaving beels or *damoshes* in its last bed. *Krishnendro Roy Chowdhry* v. *Maharanee Surno Moyoe* (1); *Indu Bhusan Bose* v. *Sarajubala Debi* (2) and *Jnanendramohan Bhadhuri* v. *Ranjit Pal Chaudhuri* (3) and possibly *Jogendra Narayan Roy* v. *Craw ford* (4) are cases of this type.

Three conflicting views have been taken. The first is that grantee having the right to fish in the river would have the right to fish in such *beels* or *damoshes* (a) if the connection with the flowing river channel is maintained throughout the year, (b) even if the connection be only during the floods of the rainy season. The extreme view is expressed in *Indu Bhusan's* case (2) that he would not have the right even if the connection be at all seasons of the year.

(5) Cases where the river at the time of changing its course leaves in its original bed *beels* or sheets of water. *Grey* v. *Anund Mohun* (5) and *Bhaba Prasad* v. *Jagadindra Nath Rai* (6) are of this type. It was held that such a *beel* must be connected at all seasons of the year with the flowing channel of the river in order to entitle the person having the right to fish in the river the right to fish therein. This type really falls within the fourth type, but we have placed it under a different head because in *Indu Bhusan Bose's* case (2) such a distinction was made and *Bhaba Prasad's* case (6) was distinguished on the ground that it was a case of a *beel* left in the original or first channel, the channel over which the river flowed at the time of the grant of the several fishery.

The cases falling within the five types are of no help in the case before us, because the plaintiff does not claim the right to fish in the Jalkars in suit on the basis that they were formed either by the overflow of the waters of the river Ganges, or that over their sites the Ganges flowed at some time or other and they are the remnants left of the abandoned river beds of the Ganges or they are to be deemed as part of the present river bed of the Ganges. In our

(1) (1873) 21 W. R. 27.
(2) (19..) C. L. J. 93.
(3) (1935) I. L. R. 63 Calc. 351.
(4) (1905) I. L. R. 32 Calc. 1141; 2 C. L. J. 569.
(5) (1864) W. R. 108.
(6) (1905) I. L. R. 33 Calc. 15.

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judgment this case would depend upon two questions namely:—(1) the nature and extent of the right of the Crown to grant a several fishery to a private individual, and (2) the extent of the grant actually made by it in this case.

In England the right of the Crown to make such grants is restricted in a two-fold manner. The river must be *both* tidal and navigable and the grant must be proved or presumed to have been made not later than the reign of King Henry II for the Magna Charta took away the King's prerogative to make such grants. In India there is no limitation in respect of time and the river need not be tidal. It is enough if it is a navigable. This position is now settled by the decision in *Raja Sreenath Roy* v. *Dinobandhu Sen* (1). The further question, namely whether the Crown in India can grant a several fishery to a private individual in *non-navigable* rivers or in *beels* and landlocked waters is a question of importance in this case.

Whatever may have been the theory of proprietorship of the sovereign power in lands during the Mohamedan times, "the English in India started with the assumption that 'all the soil belonged in absolute property to the sovereign, and that all private property in land existed by his sufference' ". The conquest had made all lands the property of the sovereign and private individuals had to derive proprietory rights in land from the sovereign by virtue of grants made by it. This was the basic idea of the Permanent Settlement of 1793 according to some authorities. On this basic idea the Government transferred in perpetuity in 1793 and thereafter a vast quantity of land to men "who were and are known as zemindars, and the property in the soil was formally declared to be vested" in those with whom permanent settlements were concluded (Land Laws of Bengal by late Mr. Justice Sarada Charan Mitter, p. 30, Original Edition). In any event the Government proceeded upon the view that it had the sole right to settle lands of whatever description to a private individual which it had not already alienated. This right to make settlements extended to all lands—whether it was firm land or land covered with water. There is in our judgment no principle on the basis of which the Crown can be prevented from dividing the rights in land and in making a grant of the right to fish as an incorporeal right, apart from the right to the subjacent soil,—in the waters covering the land to one, and either reserving to itself or granting to another

(1) (1914) L. R. 41 I. A 221; I. L. R. 42 Calc. 489; 20 C. L. J 385.

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the subjacent soil. The case of *Kooroonamoye Chowdrain v. Joy Sunker Chowdhry* (1) affords an illustration of this principle. That was the case of a grant of Jalkar right, the right to fish only, in a Pergunah. The grant was upheld and it was ruled that such a grant entitled the grantee to fish in all natural water courses, *daras* (small non-navigable channels), Jheels (long and narrow strips of landlocked water) and *beels* (ponds) not made by human agency. In the case of *Hori Das Mal v. Mahomed Jaki* (2) Garth C. J., with whom Mitter and Tottenham JJ. concurred, without expressing any opinion on the question as to whether the actual proprietory right in the soil of British India was vested in the Crown or not, observed that the Crown had "the power of making settlements or grants for purposes of revenue of all unsettled and unappropriated lands", and there "was no good reason why" the Crown "should not have the same power of making settlements of *Julkur* rights and of lands covered by water as of lands not covered by water."† Such being the extensive right of the Crown in India we are now to see what in fact was granted to Hoolaus Chand.

The earliest document on the record is a letter dated the 2nd October, 1789 (Ex. Q-B 1) written by the Collector to the Board of Revenue. The object of the letter was to draw the attention of the Board of Revenue to the question as to whether the Decennial Settlement of Gangaput Islampore was to be made with Hoolaus Chand or with the Zemindars of Conkjole. In this letter the description of Gangaput Islampore is that it is a fishery on the Ganges extending from Pointy to near Sooty together with one village in land. If this was the only document on the record, it could have been contended, as it was in fact done by Mr. Banerjee, that the Jalkar was only in the channel of the river Ganges and in no other waters. But having regard to the object of the letter, which was not to define the limits of the said Jalkar but to get instruction from the Board of Revenue as to the person with whom the Decennial Settlement was to be made, and to the other documentary evidence of a voluminous nature, this contention loses much of its force. The Board of Revenue directed the Collector to settle with Hoolaus Chand with one reservation not now material (B 2), and that direction was carried out by the Collector. The Kabuliat of the Decennial Settlement was executed by Hoolaus Chand on the 15th November, 1750, [Ex. C (1)-B 4].

(1) (1864) W. R. 267.
(2) (1885) I. L. R. 11 Calc. 434 F. B.
† See p. 444 of I. L. R. 11 Calc.—Rep.

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In this Kabuliat as also in the Kabuliat of the Permanent Settlement executed by him on the 1st June, 1800, (Ex. C-B 42), the property is described as *Purganah* Gangaput Islampore. The use of the word *Purganah* is significant. It suggests that the Jalkar comprised not merely *one* river channel but other waters situate in a big local division. The indication given by the use of the appendage *Purganah* is not, however, conclusive and is besides not of great help in fixing the limits of the Jalkar Gangaput Islampore. That Jalkar comprised what was in fact granted by Nawab Aliverdi Cawn of Bengal to Hoolaus Chand's grandmother and confirmed by Nawab Mahabat Jung to Hoolaus Chand's father. We have no direct evidence of that grant, because the *Sanads* granted by Nawab Aliverdi Cawn or by Nawab Mahabat Jung have not been produced, the evidence being they were destroyed by a fire in the year 1797 or so. The gap resulting from the absence from the record of either of those two *Sanads* has in our judgment been filled up by the other documentary evidence on the record.

On the 25th October, 1797, after the Decennial Settlement and before the Permanent Settlement with him, Hoolaus Chand made an application to the Government (Ex. G-B 29). In that application he stated that at a fire the original *Sanad* granted by Nawab Mahabat Jung to his father which was in his possession had been destroyed. He also made the statement that Pergunah Gangaput Islampore comprised fisheries in waters *within the lands of all Zemindars* which were either *Rahati* (still or stagnant waters), *Bahati* (flowing water), *Doba* (pond) and *Chharan* (deserted bed of river, from the word *Chhar*—deserted) which were within the boundaries specified in the annexure to his application. (The word *Shakasti*, (diluviated) and *Bahati* (running) refer to lands and not to waters, for in the Mehal Pergunah Gangaput Islampore some lands were also included). In that annexure the Jalkars described are :—

(1) In the big river (Ganges) from Pointy to Sooty and in its *Phandi* (branches). These were at that time settled by Hoolaus Chand with *ijaradars* (lessees for terms) who were in possession of not only the flowing stream *(Bahati)* but also of stagnant waters *(Rahati)*.

(2) In the big river Kusi between certain points with *Phandi* (branches)

(3) In the river Kalikusi between certain points with *Phandi* (branches)

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(4) In the river Kalindi between certain points with *Phandi* (branches).

In these last mentioned Jalkars the statement is also made that his ijaradars were also in possession of *Rahati* or stagnant pools.

The order passed by the Collector on the 9th June, 1798, is Ex. 4(B-33). From it appears that an enquiry was made by Kazi (Judge) Nadar Ali who submitted a report to the Collector and thereafter the Collector passed the order that Hoolaus was to keep in his possession the "Mehals in the said Pergunah as heretofore and that he should pay the revenue according to his Patta and Kabuliat. On the back of the paper recording the order are the details as mentioned in the report of Kazi Nadar Ali. It mentions the Jalkars as mentioned in Hoolaus Chand's application with some additions. By this order the Collector recognised the fact Pergunah Gangaput Islampore included in it not only the fishery in the river Ganges from pointy to Shibgung Turtipore but in other waters also and in the adjuncts of the river Ganges. The statement of claim made in Hoolaus Chand's application that he had the right to fish in stagnant waters and in *dobas* (pond) and *chharans* was not disputed by the Collector.

The next document is Ex. 11(B-45), Dehabandi return in respect of Pergunah Gangaput Islampore made to the Collector by Pratima Chowdhurani who described herself as Zemindar. This document has been printed in a misleading form. The first part up to line 22 of page 45 is a separate slip in the nature of a docket made by some officer of the Collector whose Persian signature (wrongly printed as Hulas Chand) cannot be deciphered. The succeeding portion beginning from "Sri Sri Ram" is the return made in the Bengalee language. Mr. Banerjee appearing for the appellants has urged that

(1) this document is not admissible in evidence, and

(2) that at any rate no reliance ought to be placed on it.

His argument on the first point is that this is not a return filed in pursuance of Regulation XLVIII of 1793; and that it can only be admitted in evidence under Section 13 of the Indian Evidence Act, if it can be proved that the rights of Hoolaus Chand in Gangaput Islampore had devolved upon Pratima Chowdhurani. He further says that she could not have been the widow of Hoolaus Chand for from another ancient document (Ex. 5, B 75), it appears that Parbati Chowdhurani was Hoolaus Chand's widow. The only basis on which he says that this document was not a return mentioned in Section 25 of Regulation XLVIII of 1793 is that

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the document does not contain specification of boundaries. We do not attach much importance to these arguments. As the property was a Jalkar Mehal such details as would or could be given of a village cannot be expected in the compulsory returns required from Zemindars under that Regulation. The identity of the Jalkar would ordinarily be furnished by mentioning the names by which they went and the place or local area in which they were located. This has been done in Ex. 11. The fact that the document was filed with the Collector would indicate that it was not voluntary return. At this distance of time it would be difficult to prove how Pratima Chowdhurani became the Zemindar or whether she was the widow of Hoolaus Chand or not but the fact remains that she described herself in the return as the Zemindar of that Mehal and that the return was filed by Kashi Nath Das who described himself as *Naib*, that is, the principal officer of the Zemindar. We accordingly hold that this document is admissible in evidence. It is valuable evidence, for it is a return made by the then proprietor not voluntarily but under an obligation.

The second point has been rested by Mr. Banerjee on two grounds. Firstly, he says that the document was introduced into the case in an irregular manner at a very late stage of the case, and, secondly, that the said return was made at a time when there were disputes between the proprietor of Gangaput Islampore and other adjoining proprietors and that the former was obviously creating evidence in his favour for laying claim to what in fact did not belong to him. There is no evidence to that effect in this case, but in support of his last mentioned argument, Mr. Banerjee relies only on the findings in the case of *Shama Soondutee Debia* v. *The Collector of Maldah* (1). That is not an *inter partes* judgment and the findings are accordingly not admissible in evidence [*Gavinda Narayan Singh* v. *Shamlal Sing* (2)].

This document was not in the list of documents filed by the Secretary of State. His case was closed on the 12th July, 1935. On that date the defendants called upon him to produce some documents including the Dehbandi papers of Pergunah Ekbarabad (A. 125). On the 15th July the Secretary of State produced four documents in Court, one of them being this Dehbandi paper of Gangaput Islampore and stated that that had been called from him by the defendants (A. 129). The defendants filed a rejoinder that they had not done so (A. 128). The position taken by Secre-

(1) (1869) 12 W. R. 164.

(2) (1931) L. R. 58 I. A. 125; 53 C. L. J. 333.

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tary of State was untenable and was so held by the Court; Order No. 125 (A 15). The Secretary of State, however, made an application on the 16th July for permission to adduce the said paper in evidence. This was opposed by the defendants but the Court granted him leave to adduce the same in evidence, giving the defendants the opportunity to adduce rebutting evidence. Mohamed Ismail, the record keeper of the Maldah Collectorate was recalled and examined on the 17th July. He proved the custody of the document and the document was marked an exhibit. As the genuineness of the document has not been and cannot be questioned and having regard to the fact that the defendants had an opportunity to lead rebutting evidence we do not think that we would be justified in revoking the leave granted by the learned Subordinate Judge and rule the document out. We have already expressed our opinion on the value of the document. This document mentions all the Jalkars now in suit as within Pergunah "Ganaput Islampore.,"

Three other old documents have material bearing on the question of the limits of the Jalkar Pergunah Gangaput Islampore. The first is the Robokary of the Deputy Collector of Maldah, Babu Rup Chand Bose, dated the 27th June, 1838. (Ex, 3-B 75). It gives this history of the said Mehal. After its purchase in Khas by the Government at a sale held for arrears of revenue in the year 1805, it was let out by the Government in *ijara* for terms of years. In 1836 the Board of Revenue directed an enquiry before the resettlement after the expiry of the then current *ijara* settlement. The Collector of Maldah accordingly entrusted Babu Rup Chand Bose with the duty of ascertaining the number of Jalkars within Pergunah Gangaput Islampore from Sooty to Pri pointy (some as pointy). From the Robokary it appears that Babu Rup Chand Bose conducted the enquiry under the provisions of Regulation IX of 1825. The result of his enquiry was embodied in the said Robokary. He enumerated the Jalkars within that Jalkar Mehal under two heads. Under the first head he placed the Jalkars of which the Government was in possession then and in the other those from which the Government had been dispossessed by others. All the Jalkars in suit except Gangaprosad were placed in the first list and Gangaprosad in the second list. This is a cogent piece of evidence to support the case of the Secretary of State that the Jalkars in suit are component parts of Gangaput Islampore. We cannot accept the contention of the appellants that this document stands on the same footing as

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a report made by a servant of a private Zemindar to his master. Government was no doubt in possession of the property at the time as a Khas Mehal, but the purpose of the enquiry was a public one namely to ascertain materials for revenue purposes, for the purpose of settlement under Regulation VII of 1822. This is indicated by the fact that notices were published under clause 2 of Section 5 of Regulation IX of 1825. We accordingly hold this document to be admissible in evidence. The value of the document is great, because it embodies the report of a responsible Government officer after an enquiry conducted with care and due publicity and with opportunities given to all to come and establish their rights.

The second document is Ex. O (C......appendix), a letter written by the Officiating Collector of Maldah to the Commissioner of the Rajshahi Division. After the expiry of the *ijara* settlement in 1855, the property was again offered for settlement for another term of five years, but the highest rent offered was far below the rent of the previous *ijara* settlement. The Collector gave dispossession by neighbouring Zemindars as the reason for such low offer. In his letter he stated that the said Jalkar Mehal comprised not only the waters of the river Ganges from Pointy to Sooty but also in all branch streams whether running or dead. He recommended proceedings for the recovery of the Jalkars from which the Government had been dispossessed by neighbouring Zemindars. The Board of Revenue, however, did not accept his recommendation but proposed long term settlements (Ex. O 1-B 91). In 1864 Government did not succeed in a suit in respect of a Jalkar in a portion of the river Pagla (Ex. Q 5, B 95) and proceedings to assess to revenue another portion of the Pagla also failed [Ex. Q (1) B 99]. In 1870 it lost another suit brought by Rani Samasundari Debi (Ex. Q. 3 B 118). But these suits and proceedings do not relate to any of the Jalkars now in suit. In 1870 Jalkar Pergunah Gangaput Islampore was divided into two portions. The southern portion was made Touzi No. 557 of the Maldah Collectorate and settled permanently with Poresh Nath Shaha Chowdhury and his cosharers at an annual revenue of Rs. 1700 (Ex. E.-B 131). In the A Register Poresh Nath and his cosharers were recorded as proprietors and the Jalkars included in Tauzi No. 557 were specified in column 5. They included all the Jalkars now in suit [Ex. 1 (c), B. 183-188].

The documentary evidence on the record which we have noticed above leads to the conclusion that Pergunah Gangaput

Islampore comprises the Jalkars now in suit. They have not changed their sites, at least there is no evidence to the contrary.

The evidence of possession also points to the same conclusion. In 1838 it was found that all the Jalkars in suit except Gangaprosad were in possession of the Government. The letters Exs. O and O (1) speak of the Government's dispossession from portions of Gangaput Islampore. They do not show from what parts there was dispossession. The Jalkar Mehal was an extensive one. The admission made in these letters would not necessarily imply dispossession of Government from any of the Jalkars now in suit. We have on the other hand evidence furnished by the Kabuliats executed by fishermen which prove that Poresh Nath and his co-sharers were in possession of all the Jalkars in suit including Gangaprosad from 1867 to 1882 or so : Ex. 7 to 9 (4) series tabulated at B. 101-106. Defendants were admittedly in possession from about 1889 or so, but there is not a single piece of documentary evidence prior to that period to prove their possession. They are very big Zemindars having regular Zemindari offices and a well kept record room. If they were in possession, Kabuliats and collection papers would have been forthcoming. We hold that the Jalkars in suit now are parts of Pergunah Gangaput Islampore. This disposes of the main question in the appeal, namely as to the extent of Jalkar Pergunah Gangaput Islampore

Two subordinate points have been urged by the appellants. One relates to Gangaprosad and the other to Nimajole. They say that even if Gangaprosad was included in Pergunah Gangaput Islampore it has been lost to its owners for from 1836 it was out of their possession. The Kabuliats Ex. 7 series show that Poresh Nath Shaha Chowdhury and his cosharers were in possession of Gangaprosad from 1867 at least up to 1879. Even if they were dispossessed later on, the Secretary of State for India being the purchaser at the sale held on the 4th November, 1892, for arrears of revenue is entitled to recover possession of the whole estate as created at the Permanent Settlement, and this he can do within 60 years of the said sale by the combined effect of Article 121 and Article 149 of the Indian Limitation Act.

With regard to Nimajole the contention is that whole of it has dried up. To support this contention reliance is placed on Exs. J (1) and J (2) (B. 86-87). These are two Robakaries of the Deputy Collector of the year 1845. Assessment proceedings in respect of 4251 bighas of Nimajole were dropped on the objection of Raja Vidyananda Singh (apparently the same person as Raja

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Vedanand Singh, with whom Pergunah Ekbarabad was permenently settled in 1819) on the ground that the said area was then dry land. Nimajole is an extensive piece of water and a good portion of it is still covered with water, as the Commissioner's inspection notes would show.

We accordingly hold that the learned Subordinate Judge was right in upholding the claim of the Secretary of State for India in the Jalkars in suit, except Goaltuli and Laldhubri, the claim to which was abandoned by him.

The result is that this appeal is dismissed with costs to the plaintiff respondents.

A. T. M. *Appeal dismissed.*

Before Mr. Justice R. C. Mitter and Mr. T. J. Y. Roxburgh.

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February, 15, 27, 28, 29. March, 1, 4, 5, 6, 7, 11, 12, 13 14, 15, 18, 19, 20. April, 24.

GADADHAR CHOWDHURY (*alias*) ROY CHOWDHURY, AND ON HIS DEATH HIS HEIRS AND LEGAL REPRESENTATIVES SASADHAR ROY CHOWDHURY AND OTHERS

v.

SARAT CHANDRA CHAKRAVARTY AND OTHERS.*

Char land—Possession—Hakikat Chowhaddibandi papers, if admissible in evidence—Evidence Act (I of 1872), section 32(2)—Recitals and findings in judgment not inter partes—*Judgment and decree not* inter partes, *when admissible in evidence—Suit for possession—Relief—Limitation Act (IX of 1908), schedule I, article 142—Diluviated land—Constructive possession before diluvion—Burden of proof—Adverse possession before diluvion.*

As Hakikat Chowhaddibandi papers were filed in 1799 by the zemindars in pursuance of a duty, they are admissible under section 32 (2) of the Evidence Act.

Haradas Acharjya Chowdhuri v. *Secretary of State for India in Council* (1) referred to.

*Appeals from Original Decrees Nos. 173 and 174 of 1935, against the decrees of Babu Jogendra Narayan Roy Chowdhury, Subordinate Judge, 2nd Court of Faridpur, dated the 29th March, 1935.

(1) (1917) 26 C. L. J. 590

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If on the fact an inference can be safely made that the position of the river must have remained practically unchanged between Major Rennel's survey and Decennial and Permanent Settlements, Rennel's map would be helpful when the river is shown as the boundary of the estate or of the village in question but not otherwise.

Though the recitals and findings in a judgment not *inter partes* are not admissible in evidence, such a judgment and decree are admissible to prove the fact that a decree was made in a suit between certain parties and for finding out for what lands the suit had been decreed.

A person suing for recovery of possession will be out of Court unless he can establish that he has title to the whole of the land in suit or if he proves title in a part thereof, he must on the evidence establish what exactly that part is.

The plaintiff having come to Court on a case of dispossession, article 142, schedule I of the Limitation Act, 1908, is applicable. The onus is on the plaintiff to prove that he was in possession within 12 years of the suit. In the case of lands incapable of possession, as for instance, forest lands or lands under the bed of a river, the physical possession on the part of the plaintiff before the last submergence is not necessary to enable him to fall back upon his constructive possession during the last submergence. The plaintiff can discharge the burden by proving that he was in constructive possession within 12 years of the suit. He could be in constructive possession, if he was the rightful owner and would be in time if he could prove either that the lands had appeared above water within 12 years of the suit, or if they had appeared earlier than they had become first fit for user within that period.

Suresh Chandra Mukherjee v. *Shitikanta Banerjee* (1); *Gopal Chandra Maity* v. *Monmohini Dassi* (2) and *Alabaksh* v. *Bir Bikram Manikya* (3) followed.

Dictum in *Rakhal Chandra Ghosh* v. *Durgadas Samanta* (4) dissented from.

When title to land before submergence is established, the burden lies on the person who contends that that title had been extinguished at any particular time by adverse possession.

Appeals by the Plaintiffs.

Suit for *khas* possession of Char land.

The material facts appear from the judgment.

Messrs. Atul Chandra Gupta and ***Pashupati Ghosh*** for the Appellants in both appeals.

Dr. S. C. Basak, Messrs. Rama Prosad Mookhopadhya and ***Bankim Chandra Banerjee*** for Respondent in both appeals.

Messrs. Birendra Kumar De, Probodh Chandra Kar, Jatindra

(1) (1924) I. L. R. 51 Calc. 669; 28 C. W. N. 637.
(2) (1927) 31 C. W. N. 806.
(3) (1929) 33 C. W. N. 1160.
(4) (1922) 26 C. W. N. 724 (733).

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Nath Sanyal, *Bhupendra Kishore Basu* and *Manindra Narayan Majumdar* for the Respondents in No. 173.

Mr. Pannalal Chatterjee for the Deputy Registrar in No. 173.

Messrs. Bhupendra Kishore Basu and *Probodh Chandra Kar* for the Respondents in No. 174.

Mr. Suryya Kumar Aich for the Deputy Registrar in No. 174.

C. A. V.

The following judgment was delivered:

April, 24.

These two appeals are in two suits brought by the plaintiffs (called hereafter the Kanchanpur Baboos) for Khas possession of a compact block of Char land about 6000 bighas in area. First Appeals Nos. 173 and 174 correspond respectively to Title Suits Nos. 74 and 75 of 1925 of the First Court of the Subordinate Judge at Faridpur, which on transfer were re-numbered as 10 and 11 of 1933 of the Second Court of the Subordinate Judge at Faridpur. The plaintiffs are the same in both the suits but the defendants are different, except that the Secretary of State for India in Council is common to both the suits. He is the principal defendant in Suit No. 75 and defendant No. 7 in Suit No. 74. The other principal contesting defendants in Suit No. 74 are six in number namely, Sarat Chandra Chakravarty and the Guhas. In both the suits a large number of tenants claiming to hold parcels of land either under the Secretary of State for India in Council or under Sarat Chandra Chakravarty and the Guhas, have been impleaded as defendants. As shown in the locality Suit No. 75 comprises an area of about 3790 bighas and Suit No. 74 an area of about 2342 bighas. The subject-matter of the former suit is the western portion and of the latter the eastern portion of the compact block depicted with yellow borders within Stations Nos. 1 to 25 of the commissioner's map (Map No. 1). The plaintiffs' title in both the suits rests upon the same grounds and the defence in both the suits is practically the same.

A permanently settled estate, Touzi No. 204 of the Jessore Collectorate in Pargunah Nasibshahi which was subsequently transferred to the District of Faridpore and numbered Touzi No. 959, belonged to Krishna Kishore Ghose and later to his widow Barnamoyee Dasi. On the death of Barnamoyee Dasi, there was a partition in 1899 amongst the heirs of Krishna Kishore Ghose. Upendra Nath Ghose got in his allotment among other properties, Dihi Kristopur appertaining to the said Touzi No. 959. On the 23rd October, 1901, he granted a *patni taluk* to Mohesh Chandra Saha

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Chowdhury, the predecessors of the plaintiffs, comprising the Mouzas in Dihi Kristopur and the lands of some other *taluks* or zemindaries (Exhibit 6-C 207). Mouzas Ramkantapore, Khurd Ramkantapur, Bhalabad, and Brittirchar *alias* Bittirgram are some of the Mouzas in Pergunah Nasibshahi appertaining to Dihi Kristopur. Of those Mouzas, Mouza Ramkantapur is of importance in the two suits. The plaintiffs claim the whole block in suit covered by stations 1 to 25 as re-formation in *situ* of the said Mouza Ramkantapur. In the plaint however they claimed the same as re-formation in *situ* of Ramkantapur and of other Mouzas of Dihi Kristopur and alternatively as accretions to those Mouzas of Dihi Kristopur, but at the trial in the Court below and also before us they confined their claim as stated above. The defendants respondents do not contest the fact that Ramkantapore is a village included in the said permanently settled estate No. 959 or the plaintiffs' *patni* right in the said village.

The written statement of the defendants, the Guhas, the Secretary of State for India in Council and of Sarat Chandra Chakravarty, raised the following defence now material :—

(i) that the lands in suit were at the time of the Decennial and Permanent Settlements of 1790 and 1793 respectively in the bed of the large public navigable river Padma or Bhubaneswar as it is called at this place and so had not been included in the permanently settled estate No. 959 of the Faridpore Collectorate ;

(ii) that the lands in suit are re-formation in *situ* of estate No. 381 (Bhattichur Part II), which belongs to the Guha defendants and Sarat Chandra Chakravarty, and of estate No. 940 (Teprakandi *alias* Tepurchar) which belongs to Government. This estate No. 940 according to them comprised Bhattichur Part I and other lands formed from the river bed ;

(iii) that the suits are barred by limitation ; and

(iv) that in any event the Secretary of State for India in Council and the said defendants have acquired title by adverse possession.

The learned Subordinate Judge has dismissed the suit. His material findings are (i) that the plaintiffs have failed to prove that the lands in suit are *re-formations in situ* of Ramkantapur of Dihi Kristopur and (ii) that suits are barred by time under the

We have marked the paper books thus :—
Part I, Vol. 2 of F. A. 173 of 1935 as A,
Part I, Vol. 1 of F. A. 173 of 1935 as B.
Part II, Vol. 1 of F. A. 173 of 1935 as C.
Part I, Vol. 1 of F. A. 174 of 1935 as D.

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provisions of Article 142 of the first schedule of the Limitation Act. These findings have been assailed by the appellants' Advocate, Mr. Gupta, while the Advocate for the respondents, Dr. Basak, has in addition to the pleas successfully urged by his clients in the Court below urged their case of acquisition of title by adverse possession.

The claim of the plaintiffs appellants to the lands in suit as re-formation in *situ* of Ramkantapur rests mainly upon (a) the Chowhaddibandi papers (Exhibit 10 C, 323-330), (b) the map prepared by Major Rennel, (c) proceedings of Suits Nos. 16, 17, 19 and 20 of 1902, (d) the proceedings of Suits Nos. 11, 12 and 32 of 1888 and (e) the proceedings of Suits Nos. 60 and 63 of 1905 and 40 and 41 of 1906. We will hereafter call Ramkantapur appertaining to Touzi No. 959 as Ramkantapur or Nasibshahi Ramkantapur to distinguish it from another Ramkantapore in Perganah Patpashar which will hereafter be called Patpashar Ramkantapur.

The case of the plaintiffs as presented in the lower Court and before us is that Nasibshahi Ramkantapur was at the time of the Decennial and Permanent Settlements firm land, an island between two channels of the river Padma, the northern channel, the main channel, called Bhubaneswar, and the southern channel, a narrow one, being more or less of the nature of a creek flowing from Bhubaneswar and again joining it. According to them the whole of the island on which Ramkantapur was marked with a flag in Rennel's map Ex. 23 (b)-map 20-was Ramkantapur of Nasibshahi as included in permanently settled estate Touzi No. 959. That a considerable portion of said Mouza was later on swallowed up by the main channel of the river Bhubaneswar and what remained of it—the southern portion only—was measured at the Thak survey in 1857-58 as Ramkantapur and was shown as such in the Revenue Survey map of 1858-1859 with Tola Ramespur, (Thak map Ex. 13, map No. 6; Revenue Survey map Ex. B B map No. 23). There were frequent changes in the course of the river at that place and lands of Ramkantapur came up and went down at short and frequent intervals. In October 1915 the lands in suit formed, but were covered with sand. Only in January or February 1918 they became fit for cultivation. They define at the hearing the lands of Ramkantapur as it was at the time of the Permanent Settlement thus :—

Northern boundary: The main or the northern channel of Bhubaneswar (Padma) as at the time of the Permanent Settlement;

Southern boundary : The southern boundary of the Ramkantapur as shown in the Thak and Revenue Survey maps of 1857-1858 and 1858-1859 respectively ;

Eastern boundary : The western boundary line of the lands for which decrees were passed in Title Suits Nos. 16, 17, 19 and 20 of 1902. These suits will hereafter be called the suits of 1902 ;

Western boundary : The eastern boundary line of the lands for which decrees were passed in Title Suits Nos. 11, 12 and 32 of 1888 and in Title Suits Nos. 60 and 63 of 1905 and 40 and 41 of 1906. These suits will hereafter be called the suits of 1888 and 1905 respectively.

We will now proceed to record our findings on the main question, namely whether the lands in suit are re-formations in *situ* of Ramkantapur.

It appears from the evidence that a part of Parganah Nasibshahi has another Parganah, Parganah Patpashar; both to its east and west. The said Parganah appertains to the permanently settled estates Nos. 115 and No. 160 of the Dacca Collectorate named Mahadeb Mukhopadhya and Kharija Taluk Charhai Madhabdia. The latter, namely No. 160 was later on numbered as Touzi No. 4002 of the Faridpore Collectorate. These two estates will hereafter be called the Patpashar Zemindary. The appellants and their predecessors are and were part proprietors of this Zemindary. The suits of 1888 and 1902 were by the Patpashar Zemindars against the Secretary of State for India in Council for recovery of possession of *chur* lands on the ground that they were re-formations in *situ* of their Zemindary. The suits of 1905 were also similar suits against the Secretary of State for India in Council. The Patpashar Zemindars or their tenure-holders were plaintiffs but the predecessors of the appellants claimed relief both on the basis that they were part proprietors of the Patpashar Zemindary and were also *patnidars* under the proprietors of Touzi No. 959.

The *Chowhuddibandi* (boundary) papers of Touzi No 959 have not been produced as on the application of the appellants the Collector informed them that they do not exist. But the *Chowhuddibandi* papers of the Patpashar Zemindary which had been filed in the Collectorate in 1799, have been produced. They have been marked as Exhibit 10, (C. 323). The boundaries of the Mouza Ramkantapur in Patpashar with Chak Shibnathpur and Jhowkandi as given there are as follows :

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North : River Bhubaneswar and on the other bank of the river (*par*) Mansurabad and Santoshpur.

South : River Bhubaneswar and on the other bank of the river (*par*) Baghurhat, Hajinagar, Hajiganja with Bhadrasan towards the south-eastern corner.

East : Churs known as Parchur and Mouza Harirampore.

West : Ramkantapur of Parganah Nasibshahi.

It may be noted here that of the above places Ramkantapur, Mansurabad and Hajiganj are shown in Rennel's map [Ex. 23 (b) and EE, EE, 1, (maps 20. 26, 27)] which was prepared about 1767. The northern, southern and western boundaries are important. They show that in 1799 Patpashar Ramkantapur with Chak Shibnathpur, and Jhowkanda was a block of land between two channels of the river Bhubaneswar and the whole of its western boundary was Nasibshahi, Ramkantapur. The eastern part of the last mentioned village accordingly extended to the north at least up to the northern channel and to the south at least up to the southern channel of the river Bhubaneswar as in 1799. How far these conclusions would help the appellants is however a different matter.

Dr. Basak has attacked these *Chowhuddibandi* papers (Ex. 10) on the following grounds :

(a) they are not admissible in evidence

and

(b) they are not accurate.

The Subordinate Judge has overruled the first contention on the ground that they were held to be admissible in the suits of 1902 in which the Secretary of State was a party. He further held that the Guhas and Sarat Chandra Chakravarty cannot also question their admissibility as their defence is based on a title derived from the Secretary of State for India in Council. Dr. Basak's contention is that the reasons given by the learned Subordinate Judge are unsound. We think that there is considerable force in this argument, but this does not necessarily dispose of the matter. Dr. Basak says that these papers were rightly admitted in evidence in the suits of 1902 under section 13 of the Evidence Act as the plaintiffs in those suits claimed the lands as part of Patpashar Zemindary of which those papers were the boundary papers, but that section is not available to the appellants before us because the papers are not the boundary papers of Touzi No. 959. We do not think that Ex. 10 is to be ruled out simply because section 13 of the Evidence Act cannot be invoked by

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the appellants, nor can they be admitted simply because they were admitted in the suits of 1902. In *Haradas Acharjya Chowdhuri v. Secretary of State for India in Council* (1) judgment was given in favour of the Patpashar Zemindars on the basis of those papers. Lord Buckmaster did not mention section 13 of the Evidence Act. He put great value on them on the ground that they were furnished by the Zemindar not voluntarily, but on a Government form at Government's request, and for enabling the latter to have information on important points. They were accordingly filed by the Zemindars in 1799 in pursuance of a duty. Such returns had to be made by every Zemindar of Bengal. They are therefore in our judgment admissible under section 32, cl. (2) of the Evidence Act, the persons making the statements contained in them being dead. We accordingly overrule the first contention of the respondents and hold Ex. 10 to be admissible in evidence.

The second contention of Dr. Basak has not in our opinion been established. To establish that the *Chowhuddibandi* papers cannot be relied upon as accurate he has drawn our attention to the boundaries as given therein of Mouzas Durgapur, Binayabati with Biswanathpur, of Mouza Madhabdiya, of Mouza Betikata togather with Char Betikata and Debipur and to a finding in the judgment of the Subordinate Judge in the suits of 1888 [Ex. 24 (e)—C 168 at 172]. From the boundaries of the said three Mouzas it appears that Brittichar *alias* Brittigram in Parganah Nasibshahi was to the east of Durgapur etc. Brittigram was the southern boundary (in part) of Betikata etc., the eastern boundary of which was Dholai in Parganah Nasibshahi. The suits of 1888 related to Durgapur. The case map of that suit is Exhibit V (1) (Map No. 40). Dr. Basak says that if Mouza Dholai Chur Thak No. 481 be taken as Dholai of Parganah Nasibshahi as mentioned in Ex. 10, Dholai would be the western and not the eastern boundary of Betikata as mentioned in the *Chowhuddibandi* papers. There is however, another Mouza shown in the said map as Dholaipur Char No. 3460. If that be Dholai, the boundaries of all the aforesaid Mouzas as given in the *Chowhuddibandi* papers would fit in correctly. Seeing that map No. 40 was prepared about 90 years after the *Chowhuddibandi* papers and that there were vast and almost constant changes in the river course thereafter it would not be safe to assume that Dholaichar Thak No. 481 had reformed in the same place as Mouza Dholai of 1799, especially when the

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boundaries fit in with reference to Dholaichar No. 3460. We cannot accordingly accept this argument of Dr. Basak.

Dr. Basak next draws our attention to the finding in Ex. No. 24 (e) (C. 168) to the effect that Bittirchar was to the *north-east* of Nasibshahi Ramkantapur which would not make Bittirchar as the eastern boundary of Durgapur, if the whole of Durgapur be taken to be in suit in 1888. We do not think that Dr. Basak can rely upon the said finding. The judgment Ex. 24 (e) being not an *inter partes* judgment, the appellants before us or their predecessors-in-interest not being parties, the said finding is not admissible in evidence. Moreover Mr. Gupta's rejoinder is that if finding in judgments not inter partes can be used in evidence, the Judicial Committee in the suits of 1902 held that the boundaries of Patpashar Ramkantapur were correct and relied upon them, to support one part of their judgment and decree : *Haradas Acharjya Chowdhuri* v. *Secretary of State for India in Council* (1). As we hold that findings in judgment not *inter partes* are inadmissible in evidence, and in this respect we are supported by the decisions of the Judicial Committee [*Gobinda Narayan Singh* v. *Sham Lal Singh* (2)], we overrule this point of Dr. Basak also. The *Chowhuddibandi* papers (Ex. 10) accordingly establish that to the immediate west of Patpashar Ramkantapur with Chak Shibnathpur and Jhowkanda is Nasibshahi Ramkantapur and the eastern portion of the last mentinned village was between two channels of the river Bhubaneswar as in 1799. As the Decennial Settlement was only a few years before 1799 we can infer that the state of things was the same at that time as in 1799. If therefore the position of the northern channel of Bhubaneswar as at the time of the Decennial Settlement can be located and also the western limits of Patpashar Ramkantapur then the whole of the eastern limit and the eastern portion of the northern limit of Nasibshahi Ramkantapur can be fixed with certainty.

To fix the said northern channel the appellants rely upon Major Rennel's map Ex. 23(b) (map No. 20). This locality as depicted in the said map was probably surveyed by Major Rennel in October, 1764, as his journal indicates (Rennel's Journal Pp. 27-28). The appellants filed this map, Ex. 23(b), in Court. It is a certified copy. This was sent to the Commissiener for local investigation. As Ex. 23(b) was on tracing cloth, which made the Commissioner's work to relay difficult, he asked the appellants to obtain its printed

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version from the Government map office at Calcutta. Two sheets in print were accordingly obtained from the map office and supplied to the commissioner. They have been marked Exhibits 23 and 23(a) (Maps Nos. 18 and 19). Exhibit 23(a) contains the portion which is relevant. These copies do not bear any certificate of accuracy. The endorsement on Exhibit 23 shows that they were printed by Government at Shillong in 1914. The respondents did not know that Exhibit 23 and Exhibit 23(a) had been supplied to the commissioner at his request. The commissioner found discrepancies between Exhibits 23(a) and 23(b), still he proceeded to relay Exhibit 23(a) and not Exhibit 23(b) ignoring those discrepancies as negligible. Then the consideration of the commissioner's report came up before the Court, the respondents took objection to the admissibility and accuracy of. Exhibit 23(a). (A. 827, paragraphs 17 and 23). They further made the case that Exhibit 23(a) was not genuine and had not been published under the authority of the Government (A. 836). To refute these objections the appellants made persistent efforts to lead evidence of witnesses for proving that the said copy had been purchased from the Government map office at Calcutta. They also applied to the Court to call for a report from the said office. But all their applications were opposed and rejected. They also prayed for a relay of Exhibit 23 (b), if Exhibit 23(a) was either inadmissible or inaccurate, but that prayer was also rejected, and the learned Judge dismissed the suit on the ground that Exhibit 23(b) had not been relayed and Exhibit 23(a) was inadmissible in evidence. As the appellants were all along under the impression that Exhibit 23(a), which was undoubtedly printed by the Government at Shillong was the printed version of Exhibit 23(b) we thought that ends of justice required the matter to be cleared up. We accordingly asked Dr. Basak about his attitude. He had no objectton to our taking as additional evidence the documents we have marked as Exhibits X(5) to X(12). On the said additional evidence being thus taken Dr. Basak urged before us on the strength of Major Hirst's Memoir on Rennel and the maps of Rennel published by him before 1917 (which would include Exhibits 23 and 23(a) had been withdrawn by him on the ground of inaccuracy. As the preamble to Major Hirst's Memoir only showed that he had withdrawn his Memoir of 1914 to which Rennel's maps were appended but had not stated the reasons for his withdrawal, we at the instance of both the appellants' and respondents' Advocates called for a report from a gazetted officer of the map office. That report states that the maps of Rennel published in

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1914 were withdrawn and the sale of the copies printed in 1914 had been stopped under orders of Government, but further states that the reasons for such withdrawal do not appear. They may be for inaccuracy or for some other reason. It now appears that Exhibit 23(b), the map filed originally by the defendants for relay is a tracing cloth copy or extract of plate 46. i. e. of a map issued in the Atlas published with Major Hirst's Memoir of 1917, a printed copy of which was produced before us. The differences between Exhibit 23(b) and Exhibit 23(a) are far greater than could be explained by an assumption of minor errors in tracing, and the commissioner was wholly wrong in proceeding to relay the supposed printed version Exhibit 23(a) as a substitute for Exhibit 23(b) without any orders from the Court and unknown to the other side. Furthermore, in any event, although most of the grounds urged by the respondents in the lower Court fail, on the materials we have before us, Exhibit 23(a) itself cannot in our judgment be held to be admissible ; section 36 of the Evidence Act is inapplicable as the sale of copies of Exhibit 23(a) had been stopped by Government at the time when by mistake it was sold to the appellants. The relay of Exhibit 23(a) by the commissioner must accordingly be set aside. This makes it unnecessary for us at this stage to decide whether the commissioner had taken the sub-section of the Trigonometrical Survey at the Collectorate Building at Faridpur or the site of Faridshah's Darga in that town as the correct fitting point for relaying Rennel's map or not. If the plaintiffs had identified all the other three boundaries of Ramkantapur in relation to the lands in dispute namely the southern, eastern and western boundaries and had satisfied us that the position of the river was the same in 1799 as at 1764-72 we would have remanded the case for the purpose of relaying the three versions of Rennel's map. Exhibit 23(b), Exhibit EE and Exhibit E.E.(1) on the suit lands both from Faridshah's Darga, the G. T. sub-station and from such other place from which the commissioner would have thought fit to relay them. As we are of opinion that the position of the river at he time of the Decennial and Permanent Settlements cannot be safely inferred from Rennel's map and on the evidence the identification of the western boundary has been left in a nebulous state, we do not follow that course.

We have also to consider the argument of Dr. Basak in relation to the northern boundary to the effect that even conceding that from relay of Rennel's maps we can obtain an accurate delineation of the river banks in 1764 or 1773 this would be useless for the purpose of finding the position of the banks at the time of the Decen-

nial Settlement in 1790. Exhibit 23(b), as already noted, is a copy of an extract of plate 46 of the Atlas of 1917. Exhibit EE is a copy of plate 49 of the same Atlas and bears a note to the effect that the position of the river had changed between the points 'A' and 'B' after the construction of map No. VIII (depicted in plate 46). In his Memoir referring to plates 46 and 49 (paragraphs 62 and 65) Major Hirst gives the date of survey for plate 46 as 1764 to 1773, and for plate 49 as 1764 to 1772, and the date of plate 46 as 1772, and that of plate 49 as 1773. In his special remarks on plate 49 he notes that the course of the Ganges changed along the line A B to the course shown after plate 46 of the new Atlas was constructed. A comparison of the maps also shows that there was considerable change in the southern channel, with the result that the island on which Rennel has placed Ramkantapur in Exhibit 23(b) and the island to the west of it had in the interval of four years or so undergone considerable changes in shape and size, and Ramkantapur bazar itself had apparently disappeared, since it is not shown in plate 49. From these facts and from the fact that the river Padma is an erratic river which rests uneasily in its bank, Dr. Basak argues that the state of things prevailing in 1764 or 1773 cannot in the circumstances be presumed to be what was existing either in 1790 or in 1793, when the Decennial and Permanent Settlements were made, or in 1799 when the *Chowhaddibandi* papers were filed. In this connection he relies upon a remark in the judgment in ***Haradas Acharjya Chowdhuri's*** case (1), where the map of Major Rennel (from the relay in map 3 it would appear that the same map as we have in Exhibit 23(a) was used) and the same *Chowhaddibandi* papers were produced. This remark is to the effect that the plaintiffs would have been placed in difficulty if the river had been one of the boundaries of their estate as disclosed in the boundary papers. The Judicial Committee only said that the difficulties of the plaintiffs would have been increased in that case and not that the map of Major Rennel would have useless been. To us it seems that on such a point each case must depend upon its own facts. If on the facts an inference can be safely made that the position of the river must have remained practically unchanged between Major Rennel's Survey and Decennial and Permanent Settlements Rennel's map would be helpful when the river is shown as the boundary of the estate or of the village in question, but not otherwise. In the case before as a comparison of plate 46 [Ex. 23(b)] with plate 49 (Ex. EE) shows considerable changes in the southern channel

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and some change in the northern channel. The change in the southern channel of the river as shown in Ex. EE, Ex. E and Ex. EE1, does not affect the appellants for they rely for the southern boundary not upon the map of Major Rennel, but upon Thak and Revenue Survey maps of Ramkantapur. It is conceded that if the relay of these maps of Major Rennel shows that some of the disputed land was in the bed of the southern channel, then such portion must be excluded from the plaintiff's claim. The change in the northern channel is however important. The maps show that even in 1772 or so the change in the northern channel had commenced. The Decennial Settlement was concluded about 18 years later and the *Chowhuddibandi* papers were filed about 27 years later. There were considerable changes later on. We think that in these circumstances it would not be safe to infer that the state of things existing in 1772, or so, continued up to 1799 especially when the river was erratic by nature.

Moreover as we have pointed out in discussing the *Chowhuddibandi* papers above, even if the position of the southern bank of the northern channel of the Permanent Settlement river can be determined, this will fix only the position of the north-eastern corner of Nasibshahi Ramkantapur. Thus the presumption of continuity taken with the relay of Rennel's map would not alone afford sufficient evidence to fix the whole of the northern boundary of Nasibshahi Ramkantapur, unless the appellants can establish that the whole of the island on which Rennel marked Ramkantapur was the site of that village.

There is no difficulty in fixing the southern boundary of Ramkantapur. It is shown in the Thak map of Ramkantapur (Ex. 13, map 16). This, which we will call *Thak* Mouza Ramkantapur, has been plotted on the case map by the commissioner. The southern boundary of the lands in suit is practically the northern boundary line of Thak Mouza Ramkantapur. A narrow space intervenes and is not included in these suits owing to the result of Suit No. 70 of 1893 in which Barnamoyee Dassi was the plaintiff and the Secretary of State for India was the defendant. We will have to deal with the proceedings of that suit and some of other suits in some detail later on.

We shall now consider whether the eastern boundary of Ramkantapur as it existed at the time of the Decennial and Permanent Settlements can be fixed with reasonable accuracy. The *Chowhuddibandi* papers of the Patpashar Zemindary (Ex. 10) filed in 1799 may, as we have already found, be taken to be a correct

representation of the locality at the time of Decennial and Permanent Settlements. The western boundary of Patpashar Ramkantapur is stated therein to be Nasibshahi Ramkantapur. If therefore the western limits of Patpashar Ramkantapur can be defined in the locality by the appellants, they would succeed in fixing the eastern boundary of Ramkantapur. For this purpose they rely upon the proceedings in and the final result of the suits of 1902.

Before 1902 eight annas of the Patpashar Zemindary belonged to the appellants before us, the Kanchanpur Babus, four annas to the Acharjyas of Muktagacha and the remaining four annas to the Mukherjees of Birnagar. In 1902 four suits were filed against the Secretary of State for India in Council by these different sets of co-proprietors of the Patpashar Zemindary for recovery of possession of their shares in the same block of land on the ground that it was reformation in *situ* of the land of their Patpashar Zemindary. Two were filed by the Mukherjees of Birnagore, one by the Kanchanpore Babus and the fourth by the Acharjyas of Muktagacha. They were numbered as Title Suits Nos. 16, 17, 19 and 20 of 1902. The block of land claimed in those suits and decreed ultimately by the Judicial Committee of the Privy Council has been depicted in the case map. The western boundary of that block of land (stations 34 to 31 in green) practically tallies with the eastern boundary of the block of land claimed in the suits which we have before us (station No. 1 to 6 of the case map). The relay of the commissioner of the case map of the said suits of 1902 on the present case map has not been challenged before us by any party. The plaints of those four suits are of the same type. For our judgment we will consider the plaint of suit No. 16, which was filed by the Kanchanpore Babus (Ex. M 5—C 215). The written statement filed by the Secretary of State for India in Council is not on record, but a summary of it is given in the judgment of this Court [Ex. 24—C 268 also reported *subnomine—Secretary of State for India in Council* v. *Kalika Prosad Mookerjee and others* (1)]. The case map is Ex. 5 (map No. 3). The rough sketch showing the position of missing mouzas is Ex. 5 (a) (Map No. 4), the judgment of the Judicial Committee (2) is 24 (d); the order of His Majesty in Council is Ex. 25 (C 276), the map prepared at the execution stage is Ex. 27 (map 21) and the judgment of the Subordinate Judge passed in the execution proceedings is Ex. 24 (a) (C 282).

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We need not refer to the judgment of the High Court and of the Judicial Committee of the Privy Council passed in the proceedings for execution, for, so far as the Kanchanpur Babus were concerned, the matter was compromised between them and the Secretary of State for India in Council when the appeal was pending in this Court. The petition of compromise is Ex. B (C 291) and the order of this Court recording the compromise is Ex. V (5) (C 302). We will have to consider all these documents in deciding the question as to whether the eastern limits of Nasibshahi Ramkantapur can be fixed in the locality. Some of them with other documents will also have material bearing on the question of the western boundary limits of that village.

The plaintiffs of those suits, as we have already said, claimed the lands as re-formation in *situ* of the lands of the villages of the Patpashar Zemindary. The lands claimed formed a block of land south of Mansurabad and Rustanpur *alias* Santoshpore etc. and north of Char Husaini etc. The western boundary, which is important in this case, was described as the river Padma as it then flowed and *Bhatichar* of Taranath Chakravarty, father of the defendant Sarat Chandra, that is Bhatichur Part II Touzi No. 381. The defence of the Secretary of State for India in Council was that the lands in dispute were not portions of the Patpashar Zemindary but were portions of Bhatichar, Teprakandi, Jafrabad and other Government estates (1). Bhatichar *alias* Doosra Tarafer char and portions of Taprakandi have been shown on the map Ex. 5 (Map No. 3) as to the immediate west of the lands then in suit. This Bhatichar is Bhatichar Part II (Touzi No. 381) which was sold in auction in 1865 to Kali Nath Chakravarty and Ishan Chandra Ghosh. The Rubokari of the Collector [Ex. 1(1)—C 137), the sale certificate (Ex. 1—C. 138) and the D. Register [Ex. DD (1)—C 389-392)] show that the lands of Towzi No. 381 are not in Parganah Patpashar but in Parganah Nasibshahi. The D. Register of Teprakandi also shows that it appertains to Parganah Nasibshahi [Ex. DD(2)—(C 397-400] It is also proved from the D. Register of the Patpashar Zemindary [Ex. 20(b) C—310-381], and the fact is not challenged, that the Zemindary has no land in Parganah Nasibshahi. From these facts we draw the inference that the Patpashar Zemindary had no land to the west of the lands claimed in the suits of 1902. The order of His Majesty in Council (Ex. 25-C 276), shows that whatever was claimed n those suits with the

(1) (1910) 15 C. L. J. 281 (284).

exception of the bed of the river as shown in Rennel's map was decreed in favour of the Patpashar Zemindars. The judgment of the Judicial Committee (1) shows that the lands decreed included Patpashar Ramkantapur and if we follow that judgment with the rough sketch map [Ex. 5(a) Map No. 4] it would appear that the site of Patpashar Ramkantapur itself or together with Mouza Harirampur, with Char Parchar to its east covered or more than covered to the west and east the disputed lands then in suit, which lay just to the north of the left bank of Rennel's southern channel and to the immediate east of the line joining stations 28, 29, 30, 31, 32, 33 and upto a point half way between stations 33 and 34 of the case map Ex. 5 (we will call this point station 33/2). In the map prepared at the execution stage (map 2) the stations would be 28, 29 30, 31. 32, 33 and /15. This line has been relaid in the present case map and practically coincides with the eastern boundary of the block of land claimed in the two suits. The judgment of the Judicial Committee was subject to critical examination and Dr. Basak's contention before us was that the manner in which Lord Buckmaster dealt with the case showed that Patpashar Ramkantapur had land beyond the western limits of the lands claimed there, that is to say, had lands to the west of stations 31 to 33/2. No doubt the basis of the reasoning in that judgment is to the effect that the Mouzas of the Patpashar estates more than covered the area then in dispute, and formed a solid block, and that it was therefore not essential to locate each Mouza precisely, nevertheless it was the common case of both sides that to the west of the line referred to above lay lands of Nasibshahi Parganah, and none of the parties in those suits claimed any land to the west of this line to be lands of Parganah Patpashar. On these facts the conclusion is in our opinion reasonable, having regard to the western boundary of Patpashar Ramkantapur as given in the *Chowhuddibandi* papers (Ex. 10-c 327) that the eastern part of the block of lands now in suit (at least a portion thereof) represent the reformation in *situ* of Nasibshahi Ramkantapur. We do not feel impressed with the observations of the learned Subordinate Judge that the *Chowhuddibandi* papers do not help the plaintiffs on this part of their case as the boundaries *inter se* or the relative position of Patpashar Ramkantapur, Jahowkanda and Chak Shibnathpur have not been and cannot on the evidence be

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established. Chak Shibnathpur and Jhowkanda may be either hamlets of Patpashar Ramkantapur, or if not so, cannot occupy any portions of the lands now in suit as the Patpashar Zemindars in the suits of 1902 never claimed any land to the west of the lands then in suit as within their Zemindary. The lands now in dispute as the case map of those suits (Ex. 5) show were then above water.

We do not also feel much impressed with Dr. Basak's argument that the appellants before us, who before those suits were filed had acquired the *patni* in Dibi Kristopur and were plaintiffs in Suit No. 16 of 1902 in their character as part proprietors of the Patpashar zemindary, had no title to this part as they did not then claim the lands now in suit as within their *patni* under Towzi 959, but on the other hand had admitted them in the plaint, and in the other proceedings of those suits to be parts of Bhatichar or Doosra Tarafer Char, an estate which belongs to the Guha defendants and defendant Sarat Chandra Chakravarty (Touzi No. 381). One of such admissions is recorded in Map No. 21 (Exhibit 27) prepared in 1919 by the commissioner appointed to deliver possession in execution. If the matter had been left on the other evidence in a doubtful condition, those admissions would have been decisive against the appellants' claim, but inasmuch as the other evidence establishes with reasonable certainty that at least a portion of the eastern part of the block of land now in suit is a part of Nasibshahi Ramkantapur, those admissions, which do not amount to estoppel, lose their importance. This is the view we take, a view, which, we may say in passing accords with observations made by Lord Buckmaster in *Haradas's* case (1). That judgment is binding on us as a ruling of the Judicial Committee. We are not using the findings therein to bind the defendants for the reason that the first six defendants in Suit No. 74 of 1925 were not parties thereto. Though the recitals and findings in a judgment not *inter partes* are not admissible in evidence, such a judgment and decree are, in our opinion, admissible to prove the fact that a decree was made in a suit between certain parties and for finding out for what lands the suit had been decreed. We accordingly hold that the appellants have defined the eastern boundary limits at least in part, of Nasibshahi Ramkantapur and that it tallies practically with the eastern boundary of the block of land claimed in these two suits.

There now remains for consideration the point whether the appellants have defined in the locality the western boundary limits

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of that village. The initial difficulty which meets them is that the boundary papers of Touzi No. 959 have not been and could not be produced by them. They do not now exist. It is reasonably clear that a portion of Parganah Nasibshahi juts into Paraganah Patpashar between Patpashar Ramkantapur on the east and Durgapur, Biswanathpur and Betikata, villages of the Patpashar zemindary, on the west. This the boundary papers of the Patpashar zemindary (Exhibit 10, C 323) established. It is also reasonably clear from the said boundary papers that some villages of Parganah Nasibshahi intervene between Nasibshahi Ramkantapur and Durgapur. In the boundary papers we find at least two of such villages named, namely Bittigram *alias* Bittirchar and Natikata (also called Lalikata or Ratikata in some documents). What other villages of Parganah Nasibshahi intervened we do not know and whether all villages of Parganah Nasibshahi between Durgapur on the western and Nasibshahi Ramkantapur on the eastern limit appertained to Touzi No. 959 or are within the appellants' *patni* is left uncertain on the evidence. We are also in doubt as to whether the villages of Dihi Kristopur formed a compact block of land. We do not also know what villages formed the western boundary of Nasibshahi Ramkantapur at or near about the Decennial and Permanent Settlements. We are further of opinion that the decree in the suits of 1888 and 1905 are not helpful to the appellants in fixing in the locality the western limits of Nasibshahi Ramkantapur. In these circumstances the difficulties in the appellants' way to success are great and when we take into account their admissions and the admissions of their predecessors-in-interest those difficulties appear to us to be insurmountable. They are suing for recovery of possession and would be out of Court unless they can establish that they have title to the whole of the lands in suit, or if they prove title in a part thereof, they must on the evidence establish what exactly that part is. In the case made in the lower Court and before us their title rests entirely upon the site of Nasibshahi Ramkantapur as at the time of the Decennial and Permanent Settlements. They have established that Nasibshahi Ramkantapur has as its eastern boundary the eastern limits of the lands in suit. They also have established the southern boundary, which is the southern boundary of Thak Mouza Ramkantapur (Exhibit 13-Map 6). The southern boundary of the lands in suit is practically the northern boundary of Thak Mouza Ramkantapur. A small strip between the Thak Mouza Ramkantapur and the disputed block is not in suit. That have to be given up as a result of the decree in the suit of 70 of

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1893. But the northern boundary has been left in uncertain state. It is however tolerably certain that the spot where Rennel marked Ramkantapur would be the north of Thak Mouza Ramkantapur. In fact in the suits of 1902 Rennel's Ramkantapur has been shown much to the north of *thak* Mouza Ramkantapur (Map No. 3—Exhibit 5.) But still the appellants would not succeed till the western limits of Ramkantapur are precisely fixed by them in the locality.

For fixing the said western limits the appellants rely upon the proceedings in the suits of 1888 and 1905. The plaints of Suits Nos. 11, 12 and 32 of 1888 are similar, so we will consider only one of them, Exhibit U (C. 147). They were suits by the Patpashar Zemindar's against the Secretary of State in Council. The southern boundary of the suit lands was Nasipore. The eastern boundary is stated to be Government Khas Mehal Bhelabad Teprakandi. The suit lands are depicted in the Case map of those suits [Ex. V (1) map 40] and have also been relaid by the commissioner on the present case map. A part of the western boundary of the lands in southern portion now in suit runs along the eastern boundary limits of the lands then in suit. The Subordinate Judge found the whole of the block claimed as re-formation in *situ* of Durgapur, but gave these plaintiffs a decree for a part only by excluding the portion in the middle covered by Bhattichar Bandobasti or Baloo Dhoom Sota Bhorati. This was given to Government on the ground of adverse possession [Ex. 24 (e) C 168]. The admission of the plaintiffs in the Suit of 1888 amounts to this, that the lands beyond the eastern limits of the lands then in suit were not in Parganah Patpashar but in Parganah Nasibshahi, for Teprakandi is shown in the D. Register to be in the last mentioned parganah. The eastern boundary of Durgapur Binaybati with Biswanathpur is covered by Bittirgam in Parganah Nasibshahi and Betikata in parganah Patpashar (Exhibit 10, C 323). Map No. 40 shows that the south-eastern corner of the lands then in suit just touches the north-western corner of Thak Mouza Ramkantapur—, in fact it protrudes a little into it. There is, however, no evidence on the record to show the relative position of Ramkantapur as at the time of the Decennial and Permanent Settlements with reference to Bittirchar or Bittigram. The finding in the judgment [Exhibit 24 (e), C. 168 at 172] to the effect that Bittirchar was to the north-east of Ramkantapur cannot be evidence in this case, the judgment not being *inter partes* so far as the defendants Nos. 1 to 6 in Suit No. 74 of

1925 are concerned, and it was also pronounced before the plaintiffs acquired their present interest in Touzi No. 959. This finding, if evidence, would moreover include a good portion of the lands now in suit in Bittirchar and the appellants, even if they were allowed at this stage to rest their case on Bittirchar, would find themselves in a difficulty similar to, if not greater than, that which we have already pointed out in regard to their case that the lands now in suit are lands of Ramkantapur. Though Bittirgram is included in their *patni* there is no evidence to fix the limits of Bittirgram *alias* Bittirchar, either the north-eastern or the western limit. Mr. Gupta made a suggestion to the effect that in those suits the Patpashar Zemindars had claimed as appertaining to Durgapur the whole or part of Bittirchar. In other words he would place Nasibshahi Ramkantapur as covering the whole of the present lands in dispute upto the western boundary or at any rate as covering most of them and with Bittigram to its west covering the remainder of the lands and extending over part of the lands in the 1888 suits. But this suggestion must remain a matter of surmise in the absence of any proof that Bittirchar adjoined Ramkantapur on the west. There is no evidence as to the eastern boundary of Bittirchar or as to the western boundary of Nashibshahi Ramkantapur, and no proof that there was no other village of some other estate intervening and thus covering portion of the present lands in dispute. There is thus a definite gap in the evidence on the appellants' side to establish that the whole of the disputed lands upto the western boundary appertain to their estate, and this gap can only be filled by them by surmise and not by evidence. The utmost that the proceedings of those suits can prove is that if the lands of Ramkantapur, as at the time of the Decennial and Permanent Settlements, extended further to the north of Thak Mouza Ramkantapur, that some undefined portion of the lands of that village may be falling *somewhere* within the block of land to the east of the lands in suit in 1888 as shown in Map No. 40. It would not necessarily follow that the western boundary of Ramkantapur ran exactly along the straight line shown as the eastern boundary limit of the lands then in suit. If Ramkantapur had been mentioned as the boundary village of Durgapur and if the decision in Exhibit 24 (e) (C 168) had been given on the same basis as in *Haradas Acharjya's* case (1) and their *patni* comprised a

(1) (1917) 26 C. L. J. 590.

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group of compact villages, the appellants would have stood on firmer grounds.

Of the proceedings in Suits Nos. 60 and 63 of 1905 and Nos. 40 and 41 of 1906 we have on the record only the compromise decree with two compromise petitions as annexures (Ex. V4-C 249), the case map (Ex. V4 Map 42) and the execution map (Ex. 30 Map 22). In suit No. 60 of 1905, the appellants claimed a share of the lands then in suit as part proprietors of the Patpashar Zemindary and another share as *patnidars* of Dihi Kristopur in Touzi No. 959. The Secretary of State for India was the defendant. The suit was compromised between them and the Secretary of State. By the compromise they got in their share the whole of the disputed land except a small but long rectangular strip (Ka in the decree) in the eastern and a small triangular strip (called Kha in the decree) in the south-eastern part of the lands then claimed. The case map Ex. V4 (Map 42) and the Execution Map (Ex. 30 Map 22) show that the claim was compromised on the basis of the Thak Maps of the villages of the Patpashar Zemindary, the Thak Map of what had been described Government Khas Mahal Baloodhoon Sota Bharati (Bhattichar Part I) and the Settlement Map of Government estate Teprakandi, and the parties divided the lands in suit between them in accordance therewith. The proceedings in those suits do not help the appellants in fixing the western boundary limit of Ramkantapur as claimed by them. Maps Nos. 42 and 22 furnish the basis of the compromise decree (Map 22 is clearer). This decree instead of supporting the appellants goes against them. The lines of map 42 have been relaid in the present case map. The eastern limits of the lands then in suit cover the northern part of the western boundary of the lands now in suit, in fact protrudes into it. These are all the materials on which the appellants rely for fixing the western boundary of the lands in suit with the alleged western boundary of the Ramkantapur of the Permanent Settlement.

A case was attempted to be made by the appellants that the whole of the island enclosed by the River Bhubaneswar and its southern creek, on which Rennel marked Ramkantapur in his map, Exhibit 23(b), was the site of Ramkantapur. The commissioner recorded a finding in favour of the appellants, though it was not within his function to decide the point. The learned Subordinate Judge did not accept that case and we think the grounds are cogent. Having regard to the purpose of Major Rennel's survey he did not mark in his map the extent of villages, nor did he note village

sites of all the villages of the locality. The fact that no other village site except Ramkantapur has been shown by him on the said island does not necessarily lead to the conclusion that the whole of the island was within Ramkantapur. This in fact was not argued by Mr. Gupta, but considerable emphasis was laid by him on an entry in Rennel's Journal at page 28 to the effect that he passed down a creek from the main river going by Ramkantapur, and he contends that the creek referred to must be that shown in Ex. 23(b) to the west of the island on which Ramkantapur bazar is marked by Rennel. We are asked to hold that this is an explicit statement by Rennel that Ramkantapur village extended up to the creek but as Rennel was not concerned to note every small revenue unit, we do not think that the entry can bear this interpretation.

The materials placed by the appellants do not in our judgment enable them to fix the western limits of Ramkantapur. To say the least the matter is left in doubt. In these circumstances the conduct of the appellants and their predecessors is relevant, and in our judgment settles the matter. We accordingly now proceed to review the evidence furnished by conduct.

In 1843 the Government resumed an island *Char* as its property. It was named Bhatichar and numbered Touzi No. 380. There were regular proceedings under Regulation II of 1819. The parties summoned were the proprietors of Patpashar zemindary. The proprietors of Touzi No. 959 were not parties. Exhibit L is the Robokary. It does not appear and it seems to us improbable that notice under section 24 of Regulation II of 1819 was served on the latter. The Robokary may not finally conclude the proprietors of Touzi No. 959 on the ground. But if the lands then resumed can be identified wholly or in part with the lands now in suit, those proceedings, which must have been conducted with publicity would offer some evidence against them. A certified copy of the hand-sketch of the land resumed in 1843 was given to the commissioner to relay, but he could not satisfactorily relay it. The learned Subordinate Judge however rejected the certified copy on the ground that there was nothing to show that the certified copy was taken from the resumption map of 1843. We called for the original handsketch from which the certified copy tendered was taken. On inspecting the same and following the robokary (Exhibit L) we found that the reasons given by the Subordinate Judge were wrong. We accordingly marked the original as Exhibit L—4 and the certified copy as Exhibit L—4(1). Although we have admitted the

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same in evidence the said sketch cannot lead us to any certainty. All that can be said is that two large islands, one of about 3000 bighas and another of about 13000 bighas were formed somewhere near the lands now in suit and resumed in 1843. There were frequent changes in the course of the river here between 1843 or so and 1857-58. But whatever appeared near about after diluvion seems to have retained the name of Bhatichur and number 380. Those lands were settled by Government in *ijara* till 1855. In 1855 the *Char*, as it then was, was divided into two parts—Parts I and II. Part I, the western portion, retained the old number 380 and Part II, the eastern part, was numbered Touzi No. 381. The whole *Char* was surveyed at the Thak Survey in 1857—58, Part I in Halka 584 as Bhattichar Bandobasti or Baloodhoon Sota Bharati and Part II in Halka No. 585 as Bhattichar or Doosra Tarafer Char. The portion of the whole island is shown in the Revenue Survey Map of the following year [Exhibit 16(a) Map 16]. In 1865 Part II, Touzi No. 381 was sold in auction to Kalinath Chakravarty and Ishan Chandra Ghosh [Exhibit 1(1) and Exhibit (1) C 137 and 138), who were the predecessors-in-interest of defendants Nos. 1 to 6 in Suit No. 74 of 1925. A good portion of the lands now in suit is covered by the lands of Touzis Nos. 380 and 381 as surveyed at the Thak and Revenue Survey. The lands of Suit No. 74 are those allowed to the predecessors of the Chakravarty and Guha defendants by the Board of Revenue in a compromise in Case No. 4 of 1884 (Exhibit K—Map 28) after disputes had arisen with Government on the ground that some of the lands of Mahal No. 381 had been measured in Government *Khas* Char Bhelabad Teprakandi No. 940. Those surveys of 1857 to 1859 were carried with great publicity and the proprietors of Touzi No. 959 never up to now laid any claim to that portion. On the contrary they as proprietors of Patpashar zemindary in their Suit No. 16 of 1902 admitted in the description of boundaries a good portion of the islands in suit now as part of the said Bhatichar. In 1919 at the execution stage of that suit they made the similar admission before the commissioner.

Part I of Bhatichar was retained by Government in Khas. The island submerged and came up above water in different shapes and positions at different times. Ultimately a part of it with other lands formed out of the river bed was named as Teprakandi and numbered Touzi No. 940. Many settlements for terms were made by Government with others and at those settlements maps were prepared. These settlement maps are mentioned in the commis-

sioner's report at page 208 and the following pages of Book B and have been relaid by him in the case map. In their plaint in Suit No. 60 of 1905 the appellants admitted that Government lands of Teprakandi were the eastern boundary of the lands then in suit and the compromise of that suit was on that footing, as we have already pointed out.

We will now shortly notice other suits instituted by Barnamayee Dassi, the then zemindar of Touzi No. 595. The first suit was of 1868. No definite conclusion can be arrived at with regard to it for the lands then in suit cannot be reasonably identified. The next suit by her is No. 25 of 1879 against the Secretary of State for India in Council. The plaint is Exhibit II (C 142). The lands north of the lands then in suit were admitted to be the land of Government let out in *Ijara*, To the east was a small channel and a *Kole* (blocked up course of the river). The suit lands have been plotted by the present commissioner in three ways (B 206-7), but whatever line be taken as correct, the land to the north of the lands then in suit and the lands to the east of the Kole mentioned there, cover parts of the land now in suit which Barnamayee Dassi had admitted either as Government land or to which she laid no claim though those lands were above water then.

The next series of suits are Nos. 69, 70 of 1893 and 11 of 1894. Suit No. 70 of 1893 was by Barnamayee Dassi against Secretary of State for India in Council. The plaint is Exhibit U 4 (C 188). The lands in suit are shown in the case map of that suit (Exhibit V3 Map 41) in yellow colours and marked *Kha*. That is a part of Thak Mouza Ramkantapur. In the plaint the northern boundary is described as Government land, Khas Char Tepura an *alias* for Teprakandi. This northern land falls within the lands now claimed by the appellants. The suit was compromised on the Thak of Ramkantapur and whatever fell within that Thak was taken by Barnamayee and whatever fell outside was relinquished by her as Government land (Exhibit V 3 C 192). The evidence thus furnished by the conduct of the appellants and their predecessors-in-interest are against the appellants. We accordingly hold that the appellants have failed to prove where the northern and western boundary of Ramkantapur lay. As they have thus failed to show precisely what portion of the lands in suit fell within Ramkantapur of the Permanent Settlement, their suits must be dismissed on this ground. In this view of the matter the two further questions, namely of limitation and adverse possession, become of no importance, but as the matter has been argued before us we proceed to record our findings

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thereon. We may at once state that if the appellants had established their title, the evidence is not of such a character as would have enabled us to find a title in favour of the defendants based on adverse possession.

We have already stated that the evidence is not sufficient to locate precisely the *char* that was resumed by the Government in 1843. There is also no evidence as to whether the whole of it or what portion of it became fit for possession and at what point of time. We have on record Kabuliats given by the tenants in favour of the Government of 1845 to 1857 (Exhibits N to N 6) but no attempt has been made by the defendants to identify the lands covered by those Kabuliats. In 1857-58 the lands then above water were surveyed in two Halkas. We do not know the condition of the land at that time. From 1862 onwards settlements were made by the Government of what went by the name of *Khas* Mehal Teprakandi. Those Settlement maps have been relaid by the commissioner in the Case map. His report deals with them from page 208 (Vol. B). At the defendants' instance he made a summary in paragraph 37 (e) of his report on which Dr. Basak on behalf of the Secretary of State strongly relies in support of his case of adverse possession. Item No VII shows that 752·15 acres of the lands now in suit were the lands common to the Settlement maps of Teprakandi of the years 1865, 1867, 1874, 1879 and 1885. Item X gives the area of 937·59 acres as the area of the common lands of the Settlement maps of 1867, 1874, 1879 and 1885. From these two statements the argument of Dr. Basak is that 752·15 acres in the one case and 937·59 acres in the other were continuously above water for the periods of 20 and 18 years respectively and the Government therefore had acquired title by 12 years' adverse possession. This argument assumes that the area of common lands were fit for enjoyment for the statutory period of 12 years and were being actually possessed by the tenants of the Government for that period or more. There is no definite evidence on either of these points. The evidence rather indicates a different state of things. In the Settlement map of 1862 (Exhibit O) the whole area is shown as covered with sand. In the Settlement map of 1874 (Exhibit O 3) large patches are shown as still covered with sheets of water. The Robokari of the Settlement of 1885 (Exhibit L. 15, paragraphs 2 and 45) distinctly mentions that no tenant had occupancy right in Teprakandi. That indicates that no tenant of the Government had occupied any parcel of land continuously for twelve years.

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The above documents have not been included in the printed record but we examined them when our attention was drawn to them. The Kabuliats Exhibits N 7 to N 14, which cover the period 1862 to 1874, have not been relaid, with the result that it is not possible to say what specific portions of Teprakandi had actually been possessed by the Government through its tenants during that period.

The subsequent history of the *Char* shows that the lands now in suit were even at any time above water for a continuous period of 12 years. In 1886 the whole of the Teprakandi had disappeared under the river (D. W. 16—A. 940 l. 10). In 1895-6 a small portion on the western side had reappeared (Exhibit O 5 not printed). Between 1896 and 1899 the *Char* extended eastwards but before 1905 it had again disappeared under water. Formation again began in 1906 (Exhibit M 4—Report of Mr. Gupta not printed). Exhibit 3c (map 22), (the map prepared in 1911 at the time of the execution of the decrees in the Suit of 1905—a map relaid by the commissioner on the case map) shows that nearly the whole of the lands now in suit other than in the river bed are covered with sand, except a small portion on the north. In this state of the evidence we would have held, if the point had been material, that no case of adverse possession has been made out by the Secretary of State. On the side of the defendants Nos. 1 to 6 in Suit No. 74 of 1925, the evidence is practically nil.

The question of limitation will now have to be discussed. The plaintiffs having come to Court on a case of dispossession Article 142 of the First Schedule of the Limitation Act is applicable. This is not disputed by Mr. Gupta. The *onus* is therefore on the plaintiffs to prove that they were in possession within twelve years of the suit. This is also well established. The question in the case is how that *onus* is to be discharged in case of alluvial or forest lands. Before we proceed to consider the question we record the following findings :

(a) that the lands now in suit had reappeared above water in 1915 and had become fit for user a year or so later.

(b) that the plaintiffs were not in physical possession of any portion at the time when it last submerged before reappearance in 1915.

On the basis of the last mentioned finding the learned Subordinate Judge has held the suits to be barred under Article

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142 of the Limitation Act. We think that he is not right in his decision.

In the case of lands incapable of possession, as for instance, forest lands or lands under the bed of a river, the rightful owner has possession in the eye of law. If a trespasser was in possession before submergence and had not perfected his title by adverse possession for twelve years or more, on submergence his possession ceases and the possession of the owner revives and continues till the lands are again formed and become fit for user and occupied by another. To this extent at least the case of ***Kally Churn Sahoo* v. *Secretary of State for India in Council*** (1) has been overruled by the Judicial Committee of the Privy Council in ***Secretary of State for India in Council* v. *Krishnamoni Gupta*** (2). The principle is stated in clear terms by Lord Sumner in ***Kumar Basanta Kumar Roy* v. *Secretary of State for India in Council*** (3). Referring to Article 142 he said :

"The Limitation Act does not define the term 'dispossession,' but its meaning is well settled. A man may cease to use his land because he cannot use it, since it is under water. He does not thereby discontinue his possession : constructively it continues, until he is dispossessed ; and, upon the cessation of the dispossession before the lapse of the statutory period, constructively it revives. 'There can be no discontinuance by absence of use and enjoyment, where the land is not capable of use and enjoyment'."

This passage makes it clear that the fact that the appellants had no physical possession at the time of the last submergence is not material for the purpose of enabling them to call to their aid the principle of constructive possession provided that their title had not been extinguished by adverse possession before the last submergence. The *obiter dictum* of N. R. Chatterjea and Panton, JJ. in ***Rakhal Chandra Ghose* v. *Durgadass Samanta*** (4) to the effect that the plaintiff must show his possession down to the time of the last submergence in order to continue his possession during submergence cannot be considered to be good law. In ***Suresh Chandra Mukherjee* v. *Shitikanta Banerjee*** (5); ***Gopal Chandra Maiti* v. *Monmohini Dassi*** (6) and ***Alabaksh* v. *Bir***

(1) (1881) I. L. R 6 Calc. 725 ; 8 C. L. R. 90.

(2) (1902) L. R. 29 I. A. 104 ; I. L. R. 29 Calc. 518.

(3) (1917) L. R. 44 I. A. 104 (113) ; I. L. R. 44 Calc. 858 ; 25 C. L. J. 487 (495)

(4) (1922) 26 C. W. N. 724 (733).

(5) (1924) I. L. R. 51 Calc. 669 ; 28 C. W. N. 637.

(6) (1927) 31 C. W. N. 806.

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Bikram Kishore Manikya (1) it has laid down that in the case of forest lands or alluvial lands the plaintiff can discharge the burden which lies on him under Article 142 by proving that he was in constructive possession within 12 years of the suit. He would be in constructive possession, if he was the rightful owner and would be in time if he could prove either that the lands had appeared above water within 12 years of the suit; or if they had appeared earlier than that they had become first fit for user within that period.

This leads us to the question as to who should prove that the plaintiffs had subsisting title at the date of the last submergence. Dr. Basak says that the *onus* is on the plaintiffs, for till they prove that, the law would not impute possession to them during the period of submergence. Mr. Gupta's contention is that the *onus* is on the defendants. We think that when the plaintiffs have established their title to the suit lands it is for the person who contends that that title has been extinguished at any particular time by adverse possession to establish that fact. If he succeeds, he will then have shown that he had subsisting title at the material time, if he fails the plaintiff's title will subsist. No doubt whichever side can show subsisting title at the time of submergence will have the benefit of the principle of constructive possession during submergence, but this fact can in no way affect the question that the onus of proving title by adverse possession is on him who asserts it. We have already found that the defendants have failed to establish at any period a title by adverse possession to the disputed lands. We therefore hold that, had the plaintiffs succeeded in proving their title to the suit lands as appertaining their *putni* in estate No. 959, the lands having come above water within twelve years of suit, Article 142 would not have barred their claim. The learned Subordinate Judge's ground for deciding the question of limitation against the appellants is wrong, for physical possession on their part before the last submergence is not necessary for enabling them to fall back upon their constructive possession during the last submergence.

As we hold that the plaintiffs appellants have failed to prove their title, these appeals must be dismissed with costs.

A. T. M. *Appeals dismissed.*

(1) (1929) 33 C. W. N. 1160.

Before Mr. Justice Syed Nasim Ali and Mr. Justice B. N. Rau.

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July, 9, 10, 11, 12, 15, 16, 24.

ABANI NATH MUKHOPADHYAYA ANOTHER

v.

AMAR NATH MUKHOPADHYAYA AND OTHERS.*

Will—Construction—Estate, nature of—Satyadhikari O Dakhalikar—Purushanukrame, meaning of—Indian Succession Act (XXXIX of 1925), section 84—Absolute estate given with a condition restraining alienation—Right of use in favour of others.

The material portions of the last Will of Babu Joy Kissen in paragraphs 12 and 16 are the following:—

"Para. 12—Rash Behari Mukhopadhyaya will become *Satyadhikari O Dakhalikar* of the disputed property.

Cl. (2)—" God forbid if at the time of his death he leaves no male child then his uterine brother Shib Narayan Mukhopadhyaya and on his death his eldest son *Purushanukrame* will become *Satyaban O Dakhalikar*.

Cl (3)—" God forbid if my two aforesaid grandsons (Rash Behari and Shib Narayan) or any male child of their family *(Bangsha)* be not in existence then my existing son Peary Mohan Mukhopadhyaya or his eldest son shall become *Satyaban O Dakhalikar* and shall continue as such.

Cl (4)—" But....................none of my heirs...................shall have power to transfer.

" Para. 16 If any one among my heirs or their descendants will get dances, amusements or music &c. held on the occasion of any marriage, Sradh or Puja ceremony or hold any conference in the rooms of the floor above the said Library, no one shall be entitled to raise any objection thereto. All shall have equal rights in these matters."

Held, that the estate created in favour of Rash Behari was not an estate restricted to the male line of succession but an absolute estate of inheritance.

That Shib Narayan acquired an absolute interest in the property and after his death his interest devolved on his son by inheritance. The prohibition against alienation was void in law.

The word *Purushanukrame* may mean either *in the male line* or *generation after generation* conveying an absolute estate of general inheritance. The Court under section 84 of the Indian Succession Act, 1925, ought not to adopt the plain meaning of Purushanukrame, namely, in the male line of succession and create an intestacy when another construction not leading to an intestacy is possible.

* Appeal from Appellate Decree No. 348 of 1937, against the decree of S. C. Chakravarty, Esq., Additional District Judge of Hooghly, dated the 24th September, 1936, modifying that of Thakurdas Banerjee Esq., Subordinate Judge, 2nd Court, Hooghly, dated the 30th October, 1935.

As to the time when the uncertain event specified in clause (3) of paragraph 12 of the Will is to occur, Nasim Ali, J. expressed no opinion ; Rau, J. held that the point of time intended was the date of the testator's death.

Per Nasim Ali, J. : The use of words *Satyadhikari O Dakhalikar* does not necessarily convey all the interest possessed by the testator. Some interest may be conferred which is less than his own interest.

Sreemutty Kristo Romonee Dossee v. *Maharajah Norendra Krishna Bahadoor* (1) referred to,

Appeal by Defendants Nos. 1 and 2.

The material facts appear from the judgment.

Messrs. Hiralal Chakravarty and *Syama Das Bhattacharyya* for the Appellants.

Mr. Atul Chandra Gupta, Dr. Radha Binod Pal, Messrs. Apurbadhan Mukherji and *Bijan Behari Mitter* for the Respondents.

The following judgments were delivered :

July [illegible]

Nasim Ali, J. :—The subject-matter of dispute in the suit out of which this second appeal arises is that portion of the 3 bighas 2 cottas of land with the structures and building thereon mentioned in paragraph 12 of the last will (dated July 11, 1879) in Bengali language of Babu Joy Kissen Mukherjee, a wealthy zemindar of Uttarpara does not appertain to the Uttarpara Public Library.

The following genealogy shows the relationship of the parties in the suit to Babu Joy Kissen :

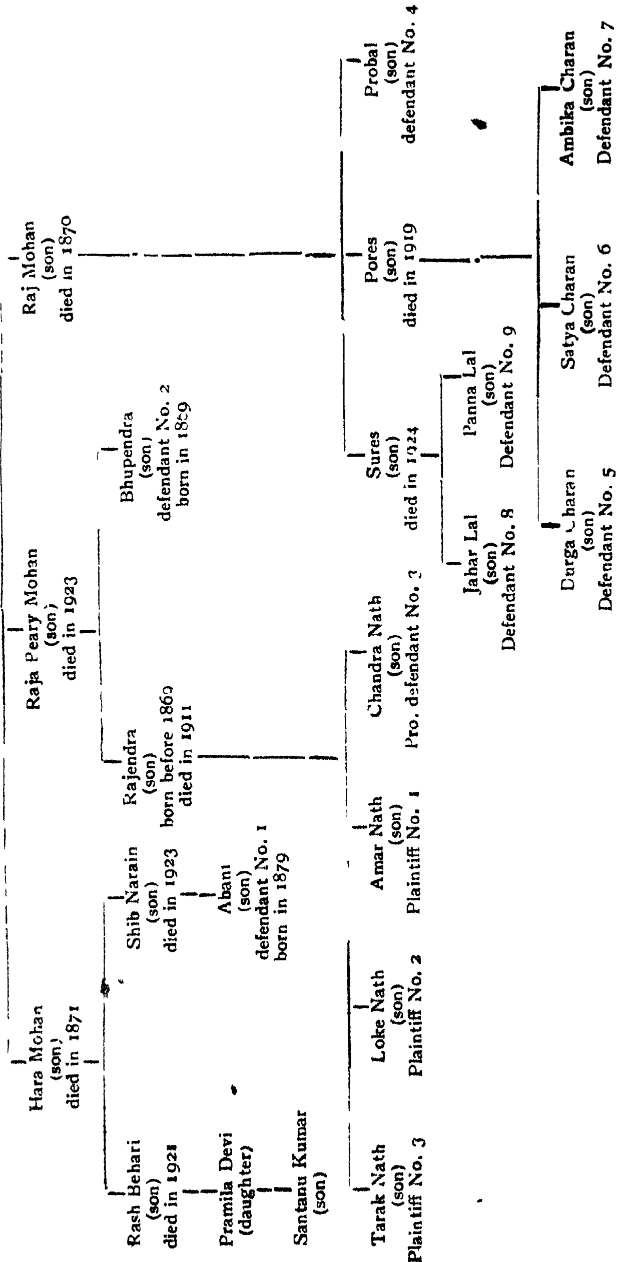
(1) (1880) L. R. 16 I. A. 29 (39) ; I. L. R. 16 Calc. 383 (392).

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On June 14, 1928, defendant No. 1 granted in favour of defendant No. 2 a lease of the disputed property for 15 years.

The material portions of the last Will of Baboo Joy Kissen are paragraphs 12 and 16 of the Will.

Paragraph 12 of the Will may be divided into four clauses :

Clause 1—Rash Behari Mukhopadhyay, in accordance with Previous arrangement (made in some previous Will) will become '*Shatyadhikari Oh Dakholikar*' (of the disputed property).

Clause 2—God forbid if at the time of his death he leaves no male child then his uterine brother Shib Narayan Mukhopadhyay and on his death his eldest son '*Purusanukromeh*' will become '*Shatyaban Oh Dakholikar* :.

Clause 3—God forbid if my two aforesaid grandsons (Rash Behari and Shib Narayan) or any male child of their family (*Bangsha*) be not in existence then my existing son Peary Mohan Mukhopadhyay or his eldest son shall become '*Shatyaban Oh Dakholikar*' and shall continue as such.

Clause 4—But .. ... none of my heirs ...... shall have power to transfer.

Paragraph 16—"If any one among my heirs or their descendants will get dances, amusements, or music etc. held on the occasion of any marriage, Sradh or Puja ceremony or hold any conference in the rooms on the floor above the said Library no one shall be entitled to raise any objection thereto. All shall have equal rights in these matters".

The questions for determination in this appeal are whether on a true construction of the last will of Joy Kissen.

(1) the heirs of Joy Kissen or their families have the right to hold *Nach* (dances), *Tamasa* (amusements), *Gan* (music) etc. on the occasions of marriage, Sradh or Puja etc. or any Baithak (conference) in the Baithakkhana (the floor above the library) in the manner specified in paragraph 16 of Joy Kissen's last Will.

(2) defendant No. 1 has got only a life interest in the disputed property.

(3) the lease of the disputed properties granted by defendant No. 1 to defendant No. 2 on June 14, 1928 or any other alienation of the disputed property by defendant No. 1 will be operative after the death of defendant No. 1.

The courts below have answered the second question in the affirmative and the third question in the negative.

So far as the first question is concerned the finding of the trial Judge is that the plaintiffs and defendants Nos. 3, 5 to 7 and

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defendant No. 9 have no such right of enjoyment but the other defendants have. A declaration to this effect was embodied in the decree passed by him.

The Additional District Judge, however, deleted from the decree of the trial court that portion of the declaration which was in favour of defendants Nos. 2, 4 and 8 as he was of opinion that these defendants did not join in the suit as plaintiffs and did not also pay the requisite court fees for such relief though at the same time he observed that the trial Judge was justified in making observation in his judgment that defendants Nos. 2, 4 and 8 had such rights of enjoyment.

Hence this second appeal by defendants Nos. 1 and 2. The plaintiffs and the other defendants have filed no cross objections.

The first contention on behalf of the appellants in this appeal is that the District Judge having found that defendants Nos. 2, 4 and 8 are not entitled in this suit to a declaration in their favour to the effect that they have got right of enjoyment of the Baitakkhana as specified in clause 16 of the Will and that he having directed the deletion of this declaration from the decree of the trial Judge he should have also deleted the observations of the trial Judge in his judgment in connection with this matter from the judgment of the trial Judge.

I accept this contention as this position was not controverted by defendants Nos. 2, 4 and 8.

The second question relates to the quantity of interest of defendant No. 1 in the disputed property under the terms of Joy Kissen's last Will.

The decision on this question depends on the true construction of paragraph 12 of the Will.

It appears from other parts of the Will (e. g. paragraphs 2, 3, 6, 10, and 17) that wherever the testator intended to bequeath his whole interest he used the word "*Puiben*" (shall get). He did not use this word in paragraph 12. The words "*Satyadhikari Oh Dakholikar*" in clause 1 of paragraph 12, therefore, were not used by him to convey all the interest possessed by him. He must have used the word to confer some interest which is less than his own interest. "There is no rule that the first recipient must take all the interest possessed by the testator, for limited interests are common enough" *Sreemutty Kristo Romoney Dossee* v. *Maharajah Norendra Krishna Bahadoor* (1).

(1) (1888) L. R. 16 I. A. 29 (39); I. L. R. 16 Calc. 383 (392).

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What then is the nature of this limited interest

The second clause lays down that on the death of Rash Behari without a male issue the property would go to Shib Narayan or his eldest son.

The contention of the plaintiffs that the limited interest given to Rash Behari by clause 1 is an English tail male. The argument in support of this contention is this:

Clause 1 should not be construed independently of the subsequent clauses. The words "God forbid if at the time of his death he leaves no *male child*" in clause 2 and the words "if there be no *male child* of their (two grandsons) families" in clause 3 by implication lay down the course of succession and limit it to the male issue of Rash Behari in succession. Clause 4 forbids alienation. The combined effect of these provisions is that the estate created in favour of Rash Behari is an English estate tail male.

I am unable to accept this contention for the following reasons:

The estate was given to Rash Behari simply without express words of inheritance. It would, in the absence of a conflicting context, carry by Hindu law an estate of inheritance: *Tagore* case (1). There are no express words in any of the 4 clauses prescribing the course of succession to the estate given to Rash Behari or limiting it to the male line as was the case in *Kumar Tarakeswar Roy* v. *Kumar Shoshi Shikhoreswar* (2). The words in clauses 2 and 3 relied on by the plaintiffs by implication do not prescribe the course of succession. They occur in clauses where the testator was not prescribing the course of succession but was laying down the contingencies on the happening of which the property would go to other persons. The construction proposed by the plaintiffs would create an English estate tail male which was prohibited by the decision in the *Tagore* case (3). It must be assumed that when the testator was making his Will 7 years later he must have had regard to the effect which the law of the country had attached to a disposition similar to an English estate tail male *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick* (4). There being no conflicting context to cut down the estate of general inheritance created in favour of Rash Behari the words in clause 4 forbidding alienation must be rejected as being repugnant or rather as an

(1) (1872) L. R. I. A. Sup. Vol. 47 (65); 18 W. R. 359; 9 B. L. R. 377 (395).
(2) (1883) L. R. 10 I. A. 51; I. L. R. 9 Calc. 952.
(3) (1872) L. R. I. A. Sup. Vol. 47: 18 W. R. 359; 9 B. L R. 377.
(4) (1857) 6 M. I. A. 526 (550).

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attempt to take away the right of transfer which the law attaches to the estate which the testator has sufficiently shown his intention to create though he has added a qualification which the law does not recognise. *Tagore* case (1)].

I therefore hold that the estate given to Rash Behari is not an English estate tail male.

The testator has not stated expressly the time when the uncertain event specified in clause 2 is to occur. In view of the provisions contained in Section 111 of the Succession Act of 1865 it may be contended that this time is the time of the death of the testator and the gift to Shib Narayan did not at all take effect. I express however no opinion on this question as it is an admitted fact in this case that after the happening of the contingency mentioned in clause 2 Shib Narayan entered into possession of the disputed property to the exclusion of Rash Behari's daughter.

What was then the nature of Shib Narayan's interest in the disputed property?

In clause 2 the testator has added the word *'Purushanukrameh'* to the words "*Shatyaban Oh Dakholikar*" while describing the nature of the interest given to Shib Narayan or his eldest son.

The object of adding the word *'Purushanukrameh'* was to prescribe expressly the course of succession to the estate created in favour of Shib Narayan or his eldest son.

This word has not acquired any technical meaning. It is used in two senses: (1) from male to male and (2) from generation to generation.

If the word was used by the testator in the first sense he would be creating an estate of inheritance which will be hit by the decision in the *Tagore* case (1). If he used the word in the second sense an estate of inheritance which would be valid in law.

The contention of the plaintiffs is that the second construction would be inconsistent with the words "if any male child of their (two grandsons) family be not in existence" in the 3rd clause and the words forbidding alienation in the 4th clause while the first construction would not.

This argument assumes that the aforesaid words in the third clause lay down the course of succession. There is no foundation however for such assumption as the testator has already prescribed the course of succession by the word "*Purusanukromek*" in clause 2. In clause 3 he was simply stating that on the death of

(1) (1872) L. R. I. A. Sup. Vol. 47 (65); 10 W. R. 359; 9 B. L. R. 377 (395).

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his two grandsons or the failure of the male child of their family (at the time of his death the time of the occurrence of this uncertain event not being stated either expressly or by implication) the property would go to Peary Mohon or his eldest son.

Where a clause or a word is susceptible of two meanings it must be interpreted according to that sense to which the law will give effect (Section 71 of the Succession Act of 1865—*Bhoobun Mohini Debya* v. *Hurrish Chunder Chowdury* (1).

If the word "*Purushanukrameh*" be interpreted in the second sense it would not be inconsistent with the provisions contained in clause 3. The law will give effect to this disposition as creating an absolute estate of general inheritance in favour of Shib Narayan and the words in clause 4 prohibiting alienation would be rejected as repugnant to this estate.

I see no reason therefore why I should not interpret the word "*Purushanukrameh*" as meaning 'generation after generation.' I accordingly hold that Sib Narayan got an estate of general inheritance and that the prohibition against alienation of this estate is void in law.

The contingency mentioned in clause 2 has not happened. Sib Narayan, therefore acquired an absolute interest in the disputed property by Joy Kissen's Will. After his death this interest has devolved on defendant No. 1 by inheritance.

The Courts below were, therefore, wrong in holding that the defendant No. 1 has got only a life interest in the disputed property.

In view of my decision on the second question, the third question must be answered in the affirmative *i. e.* in favour of the appellants.

The result, therefore, is that this appeal succeeds. The judgments and decrees of the Courts below are set aside and the suit is dismissed with costs throughout to defendants Nos. 1 and 2,

Rau, J.:—The main source of the difficulty in this case is the expression "*purushanukrame*" in Para. 12 of the Will. It is a Bengali expression though derived from Sanskrit, and the interpretation put upon it by the learned Subordinate Judge who tried the suit and the learned Additional District Judge who heard the first appeal—both of the officers whose mother tongue is Bengali—is entitled to great weight.

The Subordinate Judge after referring to the English translation of paragraphs 12 to 16 of the Will given in the plaint and to the fact

(1) (1878) L. R. 5 I. A. 138 (147); I. L. R. 4 Calc. 23 (27).

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that the defendants challenge the correctness of the translation, proceeds to give his own translation of the relevant portion of paragraph 12 of the Will thus:—"Within this land of 3 bighas 2 kattas I have built a two-storied *pucca* building, in the lower storey of which a public library has been established and a Baithak-khana in the upper storey............My eldest son Hara Mohan who was *malik* of this building having died, his son Rash Behari has become the owner and possessor (*Sattadhikari O Dakhalikar*) thereof according to previous arrangement; in case Rash Behari dies without male issue, then his brother Sib Narain and on his death his eldest son will become owner and possessor thereof, generation after generation. In the absence of male issue in their line my son Peary Mohan or his eldest son will become the owner and possessor thereof...............and none of my heirs shall have any right to alienate the aforesaid land and building." Thus the Subordinate Judge's rendering of "*Purushanukrame*" is '*generation after generation*'. He repeats this rendering in another part of the judgment; but in stating his conclusion after considering certain other clauses of the Will, he says that the testator has used the word "*Purushanukrame*" in its "plain sense of *succession by heirs male* only of the body of the donees".

The Additional District Judge's translation of this part of paragraph 12 of the Will runs:—"Upon the death of my eldest son Hara Mohan Mukhopadhya, who was the *malik* of the said land and structure, his son Rash Behari Mukhopadhya has become owner and occupant of the same. God forbid, if at the time of his death he does not leave behind any son, then his brother Sib Narain Mukhopadhya, and in his absence his eldest son will become owner and occupant *in the male line*. God forbid, if my aforesaid two grandsons or any male descendant in their line does not survive, then my living son Peary Mohan Mukhopadhya or his eldest son will become owner and occupant and will continue to be so, but none of my heirs or anybody else is vested with any power to abolish the library from the lower storey or to transfer the aforesaid land and pucca structure". Thus the Additional District Judge's rendering of "*Purushanukrame*" is *in the male line*. But in the very next sentence he says:—"All controversies have been centered round the words '*Sattwaban O Dakhalikar*', '*Purushanukrame*', and '*Uttaradhikari*' (owner and possessor, *for generation* and heir)". Here, therefore, his rendering of the word "*Purushanukrame*" is *for generation*. In a later part of the judgment he states that the words '*Putrapautradikrame*', '*Purushanukrame*' &c.

are very catching at the first sight and they are often taken to imply estates of inheritance". He repeats this observation on the next page. Still later he says that the undisputed case of both parties was, *inter alia*, that if Rash Behari died without leaving any male issue, then the property would pass to Sib Narain and in his absence to his eldest son *from generation to generation in the male line.* (This translation is no longer undisputed). Again in a succeeding passage he says :—The expressions *'Sattwadhikari'*, *'Sattwaban O Dakhalikar'* and *'Purushanukrame'* are often used in testamentary dispositions and gifts where an absolute estate of inheritance is intended in favour of the legatee or donee". Further down he says, speaking of the testator : " He first stated that the property belonged to his eldest son Hara Mohan and that he having died, passed to his eldest son Rash Behari. The next provision was that if Rash Behari died leaving *(sic)* any male issue it would pass to the testator's second grandson Sib Narain or in his absence to his eldest son *from generation to generation*". His final conclusion, however, after considering certain other clauses of the Will is put thus: " So there can remain no doubt about the fact that the expression " *Purushanukrame* " in this particular case was not used in the sense including the female also, but was totally exclusive of them."

It is not easy to gather from these judgments what the Courts below considered to be the meaning of the expression "*Purushanukrame*" standing by itself and apart from the other clauses of the Will. The general effect of the judgments appears to be this: The plain or primary sense of the expression is *in the male line*: but it has also acquired in Bengali documents, a secondary meaning, *generation after generation* and is often used to convey an absolute estate of general inheritance; but having regard to the other clauses of the Will, it appears that in this particular provision the testator has used the word in its plain or primary sense of *in the male line.*

In Wilson's Glossary (1855) the expression "*purushanukrame*" is translated as "by or in course of succession in the direct or male line". Our attention has also been invited to certain Bengali dictionaries, but as the definitions in these dictionaries repeat the word "*purush*" which is the source of the ambiguity, meaning either "man" or "generation" they do not seem to be of much assistance.

The net result is that the plain or primary sense of the expression is *in the male line*, (as stated in Wilson's Glossary and by the

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Subordinate Judge in his conclusion and as appears from the Additional District Judge's translation of paragraph 12) but that the expression is often used in Bengali documents in a more general sense to mean *generation after generation* and to convey an absolute estate of general inheritance (as stated more than once by the Additional District Judge in his judgment and as appears also from the Subordinate Judge's translation of paragraph 12).

The question now is, In which of these two senses has it been used in this particular provision? On this point, both the courts below have found that it has been used in the plain or primary sense and not in the more general sense. The main argument on behalf of the appellants before us is this: Even assuming that the expression is ambiguous, section 84 of the Indian Succession Act 1925, which by virtue of section 57 and Schedule III to the Act, applies to all Wills made by Hindus after September 1, 1870 and which, therefore, applies to the present Will, requires that where a clause is susceptible of two meanings according to one of which it has some effect and according to the other of which it can have none, the former shall be preferred. If, "*purushanukrame*" is interpreted as meaning *in the male line* the effect would be to create an estate in tail male. Such an estate cannot be created by a Hindu testator, so that this interpretation completely destroys the effect of the words; an estate of special inheritance is created, only to be instantly avoided as repugnant to Hindu Law. On the other hand, if the expression is given the more general meaning of which it is capable, namely, generation after generation, and is construed as conveying an absolute estate of general inheritance, the clause will have effect according to its tenor subject to any other valid provisions of the Will. In these circumstances, the Court ought not to adopt the former construction and create an intestacy when another construction not leading to an intestacy is possible.

In my view, this argument must succeed. We have here an expression which is equally capable, when standing by itself in a Bengali document, of meaning either *in the male line of succession* or *generation after generation*. Is there anything in the context which compels us to adopt the former meaning and create an intestacy?

The provisions of the Will relied upon for this purpose by the trial court are:—First, that in case Rash Behari leaves no male issue at the time of his death, the property is to go to his brother Sib Narain or his eldest son. Secondly, that in case Rash Behari

and Sib Narain and their male descendants are not in existence, the property is to go to Peary Mohan or to his eldest son. Thirdly, that none of the testator's heirs or successors shall have any right to alienate the property. And fourthly, that the testator's heirs and the members of their families would all have a right to use the Baithakkhana for dances, etc. in connection with any marriage etc. The first three clauses are taken from paragraph 12 of the Will and the fourth from paragraph 16. It is said that these clauses clearly show that the testator's intention was not to give an absolute estate either to Rash Behari or to Sib Narain or Sib Narain's son Abani.

The argument is hardly convincing. Undoubtedly the testator meant to qualify his gift in certain ways: but this does not show that he did not intend to give an absolute estate subject to those qualifications. In fact, we may look upon the several clauses as so many provisos or exceptions to the dispositions indicated in the previous part of the Will. Let us, however, examine the clauses more closely. The first clause restricts the estate given to Rash Behari and has no direct bearing on the interpretation of the expression "*purushanukrame*" which occurs in the Will only in connection with the estate given to Sib Narain and his eldest son. The clause may, however, have an indirect bearing on the question, as showing the character of the estate given to Rash Behari and as suggesting by analogy the nature of the gift to those coming after him. From this point of view it is relevant to observe that the gift to Rash Behari was not of an estate descending entirely in the male line. For example, if Rash Behari had died leaving a son and that son had predeceased Sib Narain leaving a daughter, there would have been nothing in the Will to prevent the daughter inheriting. For, Rash Behari's son would have excluded Sib Narain, and upon that son's death, the estate would have passed to his daughter, because the presence of Sib Narain would have excluded Peary Mohan or Peary Mohan's eldest son. It is thus clear that the estates given by the Will to Rash Behari was not an estate restricted to the male line of succession. It may be noticed further that if by any combination of events the estate had passed to Peary Mohan's eldest son under the relevant clause of the Will, the estate in his hands would have been an absolute one and would not have descended only to his male heirs, there being no such restriction in the Will. Briefly, therefore, the estate given by the Will was not, necessarily and always, an estate descending only to male holders whether in Rash

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Behari's line or in Peary Mohan's line. There is, therefore, no ground for crediting the testator with an intention to restrict the estate to male holders in Sib Narain's line alone, and as we shall see presently he has not in fact done so.

Let us now turn to the second clause which, literally translated runs: "God forbid, if my aforesaid two grandsons or the male descendants of their families are not in existence, then my existing son Peary Mohan Mukopadhya or his eldest son will become and remain owner and possessor." It may be mentioned here that Rash Behari, Sib Narain, Peary Mohan and Peary Mohan's eldest son Rajendra were all in existence at date of the Will and Sib Narain's eldest son Abani (defendant-appellant No. 1) had either been born or was *en ventre sa mere*: they were all in existence at the date of the testator's death. Now the clause in question merely says "If my aforesaid two grandsons etc. are not in existence" without mentioning any point of time. The testator could not have meant that if the contingency happened at any time however remote, the estate was to go over to Peary Mohan or his eldest son; for, Peary Mohan or his eldest son could not live for ever so as to be able to take the estate whenever the contingency happened. The testator had obviously some point of time in mind, although he has not mentioned it in the Will. In these circumstances, we may well presume that the point of time intended was the date of the testator's death, and such a construction, besides being in consonance with the principle of Section 124 of the Indian Succession Act, 1925 (which is one of the sections applicable to Hindu Wills made after September 1, 1870), would accord quite well with the other provisions of the Will. The testator first makes a gift to Rash Behari; he then provides that if Rash Behari should die without leaving any sons, the estate is to go over to Sib Narain or his eldest son. He then sees that he has made no provision for the contingency of Rash Behari and Sib Narain and their male descendants, all predeceasing himself (the testator). He, therefore, makes the provision now under consideration. This is at least one possible reading of the Will. On this view, all that the clause provides or implies is that one or other of certain male holders shall take the estate upon the testator's death, but it imposes no restriction upon the nature of the estate in that holder's hands, once he has taken it. In other words, he takes the whole of the testator's estate without qualification. On the other hand, even if we presume no particular point of time for the happening of the contingency upon

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which the estate was to pass to Peary Mohan or his eldest son—except, of course, that the contingency must happen during the life-time of Peary Mohan or his son, the clause being otherwise meaningless—the words of the clause do not warrant the assumption of a gift of an estate in tail male. For, suppose, as has actually happened, Rash Behari died without leaving a son and thereafter Sib Narain died leaving a son who survives both Peary Mohan and Peary Mohan's eldest son; suppose later Sib Narain's son leaves a daughter, how can she be excluded from the succession by this clause? Peary Mohan and his eldest son both being dead, the gift to either of them can no longer take effect so that the clause cannot operate to exclude Sib Narain's son's daughter in the case put.

As regards the clause restraining alienation, it is well known that such a clause often occurs in Indian Wills even where the testator has by a previous disposition given, in unambiguous terms, an absolute estate. The mere presence of such a clause is, therefore, no indication that an absolute gift was not intended by the previous disposition. The clause is, of course, of no legal effect.

The clause giving a right of use of the Baithakkhana to all the heirs of the testator and the members of their families on certain special occasions appears to be no more inconsistent with an absolute gift than with an estate in tail male.

It follows, therefore, that none of the clauses relied upon are sufficient to negative the construction of the expression "*purushanukrame*" as meaning *generation after generation* and as conveying an absolute gift subject to any other valid provisions of the Will.

It has been contended on behalf of the respondents that in certain other paragraphs of the Will, where the testator was beyond controversy making an absolute gift, he has not used the expression "*purushanukrame*." It may be that in view of the qualifications or restrictions which he was inserting in the Will in respect of the Baithakkhana, he desired to emphasise the fact that subject to those qualifications or restrictions the estate was to be enjoyed *generation after generation*. There is nothing in the Will which compels us first to cut down the estate to an estate in tail male and then to say in consequence that such an estate, being repugnant to Hindu Law, must be further cut down to a series of life estates, with a resulting intestacy in respect of the remainder.

I agree that the appeal must be allowed as directed by my learned brother.

A. T. M. *Appeal allowed.*

Before Mr. Justice Syed Nasim Ali and Mr. Justice B. N. Rau.

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LOKE NATH MUKHERJEE AND OTHERS

v.

ABANI NATH MUKHERJEE AND OTHERS.*

Trust—Trust, how created—Civil Procedure Code (Act V of 1908), section 92—Declaratory suit under the section, when allowed—Trustee, appointment of, validity of, if can be declared—Denial of trust property, if ground for removal of trustee—Intention of testator—Hypothetical intention—Speculation as to intention—Necessary implication—Opinion of High Court.

Mere declarations are outside the scope of section 92 of the Code of Civil Procedure, 1908. But where reliefs contemplated by the section are claimed and such reliefs cannot be granted without the determination of the question whether a public trust exists or whether a particular property appertains to a public trust the Court in a suit under section 92 can determine the question whether a public trust exists or a particular property appertains to such public trust.

A suit for a mere declaration that a trustee has not been validly appointed may be outside the scope of section 92. But in a suit under section 92 the Court has to determine whether a trustee has been validly appointed or not if determination of such a question is necessary for giving reliefs claimed in the suit which properly came under that section.

Mere assertion in a suit under section 92 by a trustee that trust properties are private properties, is not by itself a sufficient ground for his removal. If he committed any breach of trust before the suit, his conduct in the course of the suit is an important element to be taken into consideration in deciding whether the breach should be condoned and he should be allowed to retain the office.

A trust is created when the author of the trust indicates with reasonable certainty by any words or acts (a) an intention on his part to create that trust, (b) the purpose of the trust, (c) the beneficiary and (d) the trust property: *Parma Nand* v. *Nihal Chand* (1).

A Court has no power to give effect to a hypothetical intention by supplying lacunae in the Will and thereby making a new Will for the testator. The Court cannot speculate as to what the testator may suppose to have intended to write. The only intention of the testator which the Court can carry out are intentions either expressly or impliedly expressed in the Will. No indication of intention

* Appeal from Original Decree No. 60 of 1935 with Cross-objection, against the decree of K. C. Basak Esq., District Judge of Hooghly, dated the 6th October, 1934.

(1) (1938) L. R. 65 I. A. 252 (261-2); 67 C. L. J. 540 (545-6).

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is sufficient to induce the Court to hold that a certain bequest has been made, unless, as a matter of fact, the bequest is made either expressly or by necessary implication in the Will.

Necessary implication does not mean natural necessity but so strong a possibility of intention that a contrary intention cannot be supposed : *Williamson v. Adam* (1).

Per Rau, J. : It is the duty of the High Court to pronounce its opinion on an issue, on which evidence was produced, judgment of Judge recorded and large part of argument devoted in the High Court.

Appeal by the Plaintiffs and Cross-objection by the Defendants.

Suit under section 92 of the Code of Civil Procedure.

The material facts appear from the judgment.

Mr. Atul Chandra Gupta, Dr. Radha Binode Pal, Messrs. Bijan Behari Mitter and *Rabindra Kumar Goswami* for the Appellants.

Messrs. Hiralal Chakravarty, Syamadas Bhattacharyya, Gopendra Nath Das and *Sanat Kumar Chatterjee* for the Respondents.

C. A. V.

The following judgments were delivered :

July, 12.

Nasim Ali, J. :—Babu Joy Kissen Mukherjee, a wealthy zeminder of Utterpara, in the District of Hooghly, started at his own expense a public library for the use and benefit of the public of Utterpara.

There is a plot of land measuring about 3 bighas 2 cottas in Utterpara. The river Ganges is on the east of this plot and Grand Trunk Road is on its west. There are compound walls on the north south and west with two gates on the Grand Trunk Road. There is a small strip of vacant land measuring about 4 chittaks between the northern portion of the western compound wall and the Grand Trunk Road. On the east there is a parapet on the buttress. There is a pucca ghat on the river bank inside the compound. Within this plot there is a big building. It consists of a basement and two stories. There is a lawn (formerly a flower garden) to the east of this building. There are out-houses on the north and south within the compound.

The library is now located in certain rooms in the first story of the main building. The second story is a Baithakkhana. The servants of the library and the Baithakkhana reside in the out-houses.

Babu Joy Kissen was the owner of this land and the building

(1) (1812) V. and B. 422.

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thereon. On July 11, 1879, he made his last Will. The provisions of this Will relating to this property are these:

"Paragraph 12—I have caused a pucca two storied building erected within a plot of land measuring about 3 bighas 2 cottas. The public library rooms having been located in the ground floor of this building and the Baithakkhana rooms having heen located on the floor above, books are collected on the ground floor and newspapers and books etc. are purchased from time to time and they are being read and used and shall be read and used by the general public according to special rules....Upon the demise of my eldest son Hara Mohan Mukherjee the Malik of the said land and building, his son Kas Behari Mukherjee has become 'the holders of the right and possessor' (according to plaintiffs) or 'the owner and possessor' (according to defendants 1 and 2) of the said lands and buildings according to previous arrangement. God forbid if at the time of his death he leaves no male child then his uterine brother Sib Narayan Mukherjee and "on his death', (according to the plaintiffs) or 'in his default by death' (according to defendants 1 and 2) 'his eldest son in male line of succession' (according to plaintiffs) or 'generation after generation' (according to defendants 1 and 2) shall become "the holder of the right and possessor' (according to the plaintiffs) or 'owner and possessor' (according to defendants 1 and 2) thereof. God forbid if there be no male child of my two said grandsons or of their (family) then my existing son Peary Mohan Mukherjee or his eldest son shall become the holder of the right and possessor (according to plaintiffs) 'owner and possessor' according to defendants 1 and 2) and shall continue as such. But none of my heirs nor any other person shall have power to remove the public library from the ground floor or to transfer the aforesaid land and building."

"Paragraph 13—Although my aforesaid grandson and his 'aftertaker' (according to plaintiffs) or heir (according to defendants 1 and 2) shall be 'right holder in succession' (according to plaintiffs) or 'owner in successor' (according to defendants 1 and 2) of the said land and building, the big hall, the room to the west thereof, five rooms to the north and south, the small circular room on the north-western corner together with the Verandahs on the east and south and stairs to the ground on the east and west all situated on the ground floor of the building:—shall appertain to the public library and the stair-case on the south western corner of the ground

floor and the spiral stair-case which is situated outside on the northern side shall appertain to the Baitakkhana above. The expenditure on account of purchasing newspapers, new books and instruments, salaries of officers, lighting charges etc. all on account of the library are being met and shall be met from the profit of the dedicated Patni Taluks specified afterwards in Schedule marked "Tha" and from the interest of Rs. 5,000. After keeping in view the income from the Taluks dedicated to the library and fixing the expense accordingly, appointment of officers, purchase of newspapers and books etc. and other functions are being performed and shall be performed by a committee and shall not be performed by any body else. Now my son Peary Mohan Mukherjee and my grandsons Rash Behari Mukherjee and Sib Narayan Mukherjee (and my step brother Naba Krishna Mukherjee and Monmatha Nath Chatterjee of this village and Chandra Sekhar Banerjee, husband of my youngest daughter, have been appointed by me to be members of the said committee. The number of members of the said committee shall never exceed six. Of them the eldest male heir of the family of each of my sons and their heirs shall become a member. Having regard to this provision, if any of the aforesaid present members resigns from his post or dies, a fit person according to the decision of the majority of members shall be appointed in the vacancy. A member shall continue to be such during his life-time unless he resigns from his post on account of serious illness or old age or any other reason. All the work of the library shall be conducted according to the opinion of the majority of the members of the committee, but if the committee be equally divided in their opinion, then my grandson Rash Behari Mukherjee and upon his demise his representative shall have the casting vote."

"Paragraph 14—The Taluks which I have dedicated for the purpose of carrying on the expenses of this library were settled in Darpatni with my son Hara Mohan Mukherjee on a Salami of Rs. 5,000. In order to discharge the liability of Sadar rent of the mehals Government loan papers were purchased with the Selami kept in the custody of the said Hara Mohan Mukherjee; upon his demise the said Government Loan papers shall now remain with Rash Behari Mukherjee according to the provisions specified above. but except for discharging the liability of the rent of the aforesaid mehals he shall have no power to sell or make a gift of the said Loan papers for any other reason."

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" Paragraph 15.—The members of the committee shall have no right to the rooms on the upper floor and the lower floor of the library; my grandson Rash Behari Mukherjee shall have the right to these rooms but he shall have no power to sell them. The pucca kitchen, the stable and the rooms for the Durwans on the northern and southern side of the building are set apart for the residence of the servants of the library and the servants of the Baithakkhana on the floor above the library. Rash Behari Mukherjee or his representative shall meet from the library funds the cost of repairing these rooms. The flower garden on the eastern side of the library shall be under the management of the committee. The expense on account of the garden and on account of the repairs of the library rooms shall be met from the library funds."

" Paragraph 16.—No body shall have any objection if any of my heirs or their families organise dances, amusements, music, etc. in connection with any marriage ceremony or Sradh ceremony or Puja etc. or hold any conference in the rooms on the floor above the the library. Everybody shall have equal right to hold these functions."

Babu Joy Kissen died in 1888. Rash Behari died in the year 1921 leaving no male issue. Sib Narayan died in the year 1923, defendant No. 1 is his eldest son.

On June 14, 1923, defendant No. 1 executed a lease in favour of defendant No. 2, the son of Peary Mohan Mukherjee, of the entire land and the building for a term of 15 years. The material portion of this lease is this :

" According to the provisions contained in the Will of late Joy Kissen Babu I am the sixteen annas owner of the library building —only the public library is to occupy the middle floor of the said building and the servants of the Library are put up in some portions of the out-houses. It is provided in the Will that the repairing expenses of the out-houses and the middle floor would be met from the funds of the library. After causing estimates to be prepared by competent engineers and contractors I find that a thorough repair of the building will cost Rs. 20,000 or 25,000. It being extremely inconvenient in my present circumstances to maintain that building by incurring such a large expense, I could not do the same up till now. Now, as you have agreed to give a thorough repair to that building at your own expense, I execute this document and agree and promise as follows :—I grant you a rent free Ijara settlement of the property described in the schedule, including the

land underneath, building, compound, outhouses and all rights and interests for a term of 15 years from the date of this instrument .... You will have to incur large expenses for repairing that building so I fix no rent for this Ijara............The out-houses on the northern and southern portion of this property exclusive of their possession by the Public library according to the provisions of the Will of Joy Kissen Babu are included in this lease............ The sum that will be spent by you in making proper, i. e., 'thorough repairs' of this property shall be deemed to be the 'premium' for this lease, but the same not having been determined at present, I fix the same approximately at Rs. 25,000 twenty-five thousand rupees, for the stamp of this instrument. Be it expressed that even if your costs for repairs or 'addition', 'alteration' and 'fitting connection' etc. exceed or fall short of Rs. 25,000 twenty-five thousand rupees, the term of this lease shall not be more or less than 15 years and in the event of your desiring to purchase this property within the term of this lease and serving me with notice, I shall remain bound by the covenant to execute in your favour a Kobala for out and out sale and free from incumbrances on receipt of a consideration of thirty-five thousand rupees. Be it further expressed that your total costs of repairs, 'addition', 'alteration' and indispensably necessary 'fitting connection' etc. must not be less than twenty thousand rupees...............Excluding from the said property the right of possession and enjoyment by the Utterpara public library under the terms of the Will executed on the 11th July 1879 by the late Joy Kissen Mukherjee the rest of the property is the subject-matter of this instrument."

On July 30, 1931, the present suit was instituted by the three grandsons of Peary Mohan and six other residents of Utterpara in the Court of the District Judge of Hooghly under section 92 of the Code of Civil Procedure with the sanction of the Collector of Hooghly.

The allegations in the plaint so far as they are material for purposes of this appeal are these:

Babu Joy Kissen Mukherjee dedicated to the Utterpara public library the properties mentioned in the Schedule 'C' to the plaint, viz.:—

(1) In the ground floor of the main building big hall and the room to the west thereof, five rooms in the north and the south, small circular room at the north-western corner together with one storied verandahs on the south and the east and stair-cases leading to the ground floor on the east and the west.

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(2) Out-houses on the north and south of the main building.

(3) Vacant land known as Phulbagan (flower garden) measuring about 1½ bighas, to the east of the said building.

(4) Wall and masonry ghat on the bank of the Ganges.

He confirmed the said arrangement by the provisions made in clauses 12, 13, 14 and 15 of his last Will. The persons named and described at the end of the paragraph 12 of the said Will viz.: Rash Behari Mukherjee and Sib Narayan Mukherjee were but trustees and at present the defendant No. 1 is but a trustee holding these rooms, the flower garden and out-houses in trust and for the use and benefit of the Uttarpara Public Library. The said Library is now in charge of the committee appointed in pursuance of clause 13 of the said Will and the principal and the pro forma defendants (defendants Nos. 1 to 6) are all members of the said committee. Defendant No. 1 is the President of the said committee. Under the terms of the Will the members of the committee of management have been constituted trustees of the Library and they are holding the properties of the said Library including the properties described in Schedule C in trust for the library. The bathing ghat to the east of the flower garden appertains to the trust estate having been constructed from the said Library funds. The defendant No. 1 taking advantage of his position of the trustee of the said premises on behalf of the said Library and asserting his personal right to the entire premises including the flower garden and the bathing ghat has leased out the said premises with the underlying and adjoining lands including the aforesaid flower garden and the bathing ghat to the defendant No. 2 for a term of 15 years by a Patta, dated June 14, 1928. There was absolutely no necessity for the said lease for the repair of the Library rooms and out-houses etc. as sufficient provision has been made therefor in the aforesaid Will. The said Ijara is null and void and not at all operative with regard to the library rooms, out houses, flower garden and bathing ghat which appertain to the trust estate of the Uttarpara Public Library. A cloud has been thrown upon the rights of the Uttarpara Public Library by the recitals in the said Ijara lease. It has, therefore, become necessary in the interests of the Library to remove this cloud by the institution of a suit for declaration of the rights of the Uttarpara Public Library as conferred by the Will on a proper construction thereof and also for the removal of the defendants Nos. 1 and 2 from their offices as members of the committee.

Prayers of the plaintiff in the plaint so far as they are relevant for the purposes of the present appeal are :

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(a) A declaration that the properties described in Schedule C to this plaint including the flower garden to the east of the Library rooms and the bathing ghat to the west of the flower garden appertain to Trust Estate created in favour of the Uttarpara Public Library and that the trust properties cannot be alienated by the defendant No. 1.

(b) A declaration that the lease executed in favour of defendant No. 2 by defendant No. 1 on June 14, 1928, is null and void regarding the properties described in Schedule C including the said flower garden.

(c) Removal of defendants 1 and 2 from their office as a member of the managing committee of the Uttarpara Public Library.

(d) Appointment of members of the committee of management in their place.

On 2nd September, 1931, defendant No. 4 filed a written statement supporting the plaintiffs.

On October 6, 1931, defendant No. 2 resigned his membership of the Managing Committee of the Library. Santanu Banerjee (son of the daughter of Rash Behari) was appointed in his place as member of the Committee by the other members of the Managing Committee.

On December 2nd, 1931, defendant No. 2 filed his written statement, stating *inter alia* (1) that he has ceased to be one of the alleged trustees mentioned in the plaint and as such he is liable to be dismissed from the category of the defendants: (2) that he has been advised to state that no valid trust has been created by the Will of Joy Kissen in favour of Utterpara Public Library: (3) that one of the ground floor rooms of the premises was permitted to be used by the local people by the leave and license of Joy Kissen Mukherjee and his successors-in-interest as a reading room: (4) that the plaintiffs have got no right to use any portion of the said building by virtue of any right accruing to them or any of them on the basis of the alleged trust: (5) that the Ijara lease in his favour is not null and void: (6) that with the knowledge, consent and acquiescence of the plaintiffs he has exercised his tenancy right with regard to the said premises and has caused thorough repairs to be done to the said building at a cost of over Rs. 50,000 as the said building was prior to such repairs in an utter state of disrepair and in a tottering condition; (7) that he has not committed any breach of trust.

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On December 17, 1931, defendant No. 3 filed a written statement supporting the plaintiffs.

On January 4, 1932, defendant No. 1 filed his written statement. His defence is in substance the same as that of the defendant No. 2. On the same day defendants 5 and 6 filed their written statement. They state *inter alia* that they do not admit the validity or otherwise of the trust in favour of the Utterpara Public Library but they leave the determination of such question entirely to the Court.

On November 17, 1932, plaintiffs filed an application before the District Judge for amendment of the plaint stating *inter alia* that they have come to know on inspection of the account books, minute books, etc. of the Library several instances of mismanagement. Sixteen instances were specified in this petition out of which the following only were pressed by the plaintiffs against the defendant No. 1 in this Court :—

(a) Though properties mentioned in Schedule C of the plaint appertain to the trust estate the defendant No. 1 asserted his personal right to it.

(b) That the parcel of land, lying to the west of the railings of the compound of the building and measuring 4 chattacks 10 sq. inches appertains to the trust estate of the Utterpara Public Library and fetched an annual income of Rs. 150. The defendant No. 2 has evicted the tenants and has caused a loss to the trust estate. The defendant No. 1 acquiesced in it.

(c) That the northern and southern out-houses appertaining to the trust estate used to be let out by the said committee at a monthly rent of Rs. 7. The contractors engaged by the defendant No. 2 have evicted the tenants without any protest from defendant No. 1.

(d) That the defendant No. 1 was a party to the appointment of Santanu in place of defendant No. 2 as a member of the committee in contravention of the terms and provisions of Joy Kissen's Will and there is no one on the committee at present representing the family of Peary Mohan Mukherjee, second son of the donor.

This petition was allowed and the plaint was amended. Santanu was added as defendant No. 7 in this suit. A prayer for declaration that his election was illegal and void was added. The Schedule C of the plaint was amended by including in it the strip of land measuring 4 chattacks 10 sq. inches on the Grand Trunk Road outside the compound railings on the west,

On January 8, 1934, defendant No. 1 filed an additional written statement stating *inter alia* :

(1) That the 4 chattaks of land to the west of the railings never belonged to the testator. It was not given to the Library.

(2) That the northern and southern out-houses were allowed to be used by the Library servants under the terms of the Will though not exclusive but jointly with the servants of the malik of the house. The northern out-house was never let out and the letting out itself is an unauthorised act. When the repairs of the whole house including the Library portion was taken up it was necessary that some of the contractor's men should remain on the spot, so they were alleged to occupy the southern out-houses.

(3) That the appointment of defendant No. 7 as a member of the committee in place of defendant No. 2 is not in contravention of the terms and provisions of the Will.

On January 8, 1934, defendant No. 7 filed his written statement stating that he has been validly appointed according to the terms of the Will of Joy Kissen and that he cannot be removed under the present suit under section 92 as he was not concerned with any of the acts alleged in the plaint or in the amending petition which have been done prior to his appointment.

The suit was dismissed by the District Judge on October 6, 1934.

Hence this appeal by the plaintiffs. The defendants 1 and 2 have also filed cross-objections against certain findings of the District Judge.

Plaintiffs in this suit pray for a declaration that the properties mentioned in Schedule C to the plaint appertain to the trust estate executed in favour of the Uttarpara Public Library and that the election of defendant No. 7 as a member of the committee is illegal and void. The contention of defendant Nos. 1 and 2 is that such declarations cannot be given under section 92 of the Code of Civil Procedure.

Mere declarations are outside the scope of section 92 of the Code. But where reliefs contemplated by the section are claimed and such reliefs cannot be granted without the determination of the question whether a public trust exists or whether a particular property appertains to a public trust the Court in a suit under section 92 can determine the question whether a public trust exists or a particular property appertains to such public trust.

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A suit for a mere declaration that a trustee has not been validly appointed may be outside the scope of section 92. But in a suit under section 92 the Court has to determine whether a trustee has been validly appointed or not if determination of such a question is necessary for giving reliefs claimed in the suit which properly come under that section.

That the Library is a trust for the public purpose of a charitable nature within the meaning of section 92 of the Code of Civil Procedure is not disputed in this case. It is also an admitted fact that the defendants are trustees of this public trust within the meaning of this section.

In the trial Court plaintiffs prayed for the removal of all the defendants on various grounds. In this Court they abandoned their prayer for removal of defendants other than defendant No. 1, and pressed for the removal of only defendant No. 1 on the four grounds mentioned above, and also on an additional ground, viz., that he denied the trust altogether in his written statement and in his memorandum of cross-objections in this Court.

The contention of the plaintiffs is that the defendant No. 1 committed breach of trust by asserting his personal right in the properties mentioned in Schedule C of the plaint in the lease executed by him in favour of defendant No. 2 on June 14, 1928.

There is no substance in this charge. The lease by defendant No. 1 expressly excludes from the lease the right of possession and enjoyment by the Library under the terms of Joy Kissen's Will of 1879.

The case of the plaintiffs in this Court is that the parcel of land lying to the west of the railings of the compounds of the building appertains to the trust estate of the Uttarpara Public Library and that the defendant No. 1 committed breach of trust by his acquiescence in the eviction by defendant No. 2 of the tenants who were occupying certain shops of this strip of land constructed out of the Library fund and were paying Rs. 150 annually as rent to the Library.

The District Judge has found that this narrow strip of land does not fall within the boundaries of the 3 bighas 2 cottas of land mentioned in clause 12 of Joy Kissen's Will. He has further found that the Library has no right to this strip of land. Plaintiffs' contention in this appeal with regard to this 4 chattaks of land is this: It falls within the boundaries of the 3 bighas 2 cottas of land. After Babu Joy Kissen's death in the year 1888, the committee of the Library built certain structures on this strip of land from the Library fund

with the approval and consent of Babu Rash Behari Mukherjee. These structures were let out as shops and the rent realised from the tenants thereof were utilised for the purposes of the Library with the consent of Babu Rash Behari and his successors-in-interest till the year 1931. This narrow strip of land, therefore, has become a part of the Library properties either by a grant from Rash Behari Mukherjee or his successors-in-interest or by adverse possession for more than 12 years.

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Plaintiffs' case in the plaint is that the properties mentioned in Schedule C to the plaint were dedicated to the Library by Babu Joy Kissen. This strip of land was not included in this schedule when the plaint was filed. It was included in this schedule when the plaint was amended on the basis of the petition filed by the plaintiffs on November 17, 1932. This case was abandoned by the plaintiffs in this Court.

Plaintiffs' case in this Court, viz., that this narrow strip of land has become a part of the Library properties either by grant from Rash Behari and his successors-in-interest or by adverse possession for more than 12 years is a new case and I cannot allow them to make this case at this stage as it involves questions of fact.

In this view of the matter the decision of the question whether this strip of land falls within the boundaries of the premises in question is wholly unnecessary for the disposal of this suit. The finding of the District Judge on this question is, therefore, set aside and the question is left open.

The shops on this strip of land were certain sheds which were attached to the compound wall. They were removed with the consent of all the members of the Managing Committee when the defendant No. 2 effected thorough repairs of all the buildings and the compound wall in pursuance of the terms of the lease granted to him by defendant No. 1 in 1928 to 1931. Defendant No. 1 alone therefore, cannot be held responsible for the removal of these shops. Plaintiffs have abandoned in this Court their prayer of removal of the other members of the Managing Committee on this ground. It is not disputed in this case that the Library rooms have been thoroughly repaired at the expense of the defendant No. 2. If the eviction of the tenants on this strip of land is not an act of breach of trust on the part of the other members of the Managing Committee it is difficult to see how it can be treated as a breach of trust on the part of the defendant No. 1. Further, plaintiffs have failed in this case to substantiate their case in the plaint that this strip of

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land was dedicated to the Library by Joy Kissen. Defendant No. 1 is not, therefore, liable to be removed on this ground.

The next charge urged against the defendant No. 1 in this Court is that he acquiesced in the eviction by the contractors engaged by defendant No. 2 for the repair of the buildings of the tenants who had been occupying the southern out-houses appertaining to the trust estate and paying a monthly rent of Rs. 7 to the Library.

By the Will of Joy Kissen all the out-houses were set apart for the residence of the servants of the Baithakkhana and the Library. Rash Behari and his successors-in-interest were directed to repair these out-houses out of the Library fund. The Library had not sufficient funds for repairing the Library rooms or the out-houses. The contractors employed by the defendant No. 2 required the southern out-houses for storing the materials for repair. The committee were therefore justified in allowing the contractors to occupying the southern out-houses. The plaintiffs have not pressed this charge against the other members of the Managing Committee. In these circumstances I hold that the defendant No. 1 is not liable to be removed on this ground.

Mere assertion in a suit under section 92 of the Code of Civil Procedure by a trustee that trust properties are private properties is not by itself a sufficient ground for his removal. If he committed any breach of trust before the suit, his conduct in the course of the suit is an important element to be taken into consideration in deciding whether the breach should be condoned and he should be allowed to retain the office.

The provisions of Joy Kissen's Will relating to the property have not been construed by any Court before. There is a statement in Joy Kissen's Will that according to previous arrangement Hara Mohan had become the Malik of the lands and the buildings and after his death Rash Behari and his successors had acquired certain rights of ownership in the said land and buildings. Plaintiffs in their plaint stated that Babu Joy Kissen Mukherjee dedicated to the Library the properties mentioned in Schedule C of the plaint and that he confirmed the said arrangement by his last Will. The properties were mortgaged by Rash Behari on the footing that they were his absolute properties. On the basis of this mortgage the properties were sold and purchased by one Pramila Sundari Devi. On June 17, 1928, defendant No. 1 had to take a conveyance of this property from Pramila for a consideration of Rs. 2,000 apparently to put an end to the dispute. The rights of Rash Behari and

his successors-in-interest to this property were not judicially determined before this litigation. Plaintiffs themselves have prayed for construction of the provisions of Joy Kissen's Will relating to this property in the suit.

Defendant No. 1 did not seriously dispute in the trial Court that the Library had the right to use certain rooms in the ground floor and that its servants had the right to reside in the out-houses along with the servants of the Baithakkhana. In this Court, the learned Advocate for defendant No. 1, did not challenge the finding of the District Judge that those rooms in the ground floor were dedicated to the use of the Library and that the servants of the Library have right to reside in the out-houses jointly with the servants of the Baithakkhana.

The construction of the provisions of the Will relating to the flower garden is not free from difficulty. There are no express words in the Will stating that the Library would have the right to enjoy the amenities of this garden. In the absence of any express words it is not unnatural that doubts would arise regarding the right of the Library to this garden

Plaintiffs' contention is that the testator intended that the amenities of the flower garden would be enjoyed only by the Library and this intention is implied in the last portion of paragraph 15 of Joy Kissen's Will.

The case of the defendant No. 1 is that the testator's intention was that the amenities of the garden would be enjoyed only by Rash Behari and the other donees mentioned in clause 12 of the Will.

A trust is created when the author of the trust indicates with reasonable certainty by any words or acts (a) an intention on his part to create that trust, (b) the purpose of the trust, (c) the beneficiary and (d) the trust property. [See section 5 of the Indian Trust Act. *Parma Nand* v. *Nihal Chund* (1)].

The Court has no power to give effect to a hypothetical intention by supplying lacunæ in the Will and thereby making a new Will for the testator. The Court cannot speculate as to what the testator may suppose to have intended to write. The only intentions of the testator which the Court can carry out are intentions either expressly or impliedly expressed in the Will. No indication of intention is sufficient to induce the Court to hold that a certain bequest has been made, unless, as a matter of fact, the bequest is made either expressly or by necessary implication in the Will.

(1) (1938) L. R. 65 I. A. 252 (261-262); 67 C. L. J. 540 (545-546).

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Necessary implication does not mean natural necessity but so strong a possibility of intention, that a contrary intention cannot be supposed: *Williamson* v. *Adam* (1). This definition has been simplified by Jems, L. J. in *Crook* v. *Hill* (2), thus:—

"The question, then, resolves itself into this:—Whether, having regard to the language of this Will, guarding ourselves scrupulously against indulging in conjecture, or in an attempt to do what we think the testator would have done if he had been better informed or better advised, but taking into consideration the whole of the Will, and the whole of the surrounding circumstances at the time the Will was made, which are legitimately to be brought in for the purpose of explaining his expressions though not for the purpose of altering or adding to them, there is in this case so strong a probability of intention to include, or not to exclude the children in question as that a contrary intention cannot be supposed."

By clause 15 of the Will the flower garden has been placed under the control or management of the Managing Committee of the Library and they have been directed to maintain it out of the Library fund. What is the implication of these provisions? The repairs of the Library rooms and of the out-houses in which the Library has some interest are to be effected out of the Library fund. The flower garden adjoins the Library rooms. At the same time, the Baithakkhana is above the Library rooms and although the out-houses are to be repaired out of the Library fund the servants of the Baithakkhana have the right to reside in them jointly with the servants of the Library. It can be, therefore, said with reasonable certainty that the intention of the testator was that only the amenities of the flower garden would be enjoyed by the Library as well as by Rash Behari and the other donees mentioned in clause 12 of the Will as a contrary intention cannot be reasonably supposed.

Plaintiffs' contention is that the wall and the masonry ghat on the bank of the Ganges were dedicated to the Library by Joy Kissen. The defendant No. 1 denies this. There is nothing in the Will of Joy Kissen to shew that the wall and the ghat were dedicated either expressly or by necessary implication.

The mere fact that some steps of the masonry ghat and the wall were constructed out of the Library fund by the Library Committee long after Joy Kissen's death is irrelevant to the question whether Joy Kissen intended to dedicate the wall and the ghat to the Library.

(1) (1812) V. & B. 422. (2) (1871) 6 Ch. 311.

The question whether the defendant No. 7 has been validly appointed as a member of the Managing Committee of the Library in place of defendant No. 2 arises for decision in this suit as the plaintiffs' allegation in this suit is that the defendant No. 1 was a party to the election of defendant No. 7 in place of defendant No. 2 in contravention of the directions given in Joy Kissen's Will.

The direction of the testator in paragraph 13 of the Will is that the eldest male heirs of each of his sons and their heirs shall be a member of the committee. He had three sons—Hara Mohan, Peary Mohan and Raj Mohan. At least three members of the committee, therefore, must be the three eldest male heirs of each of his sons and their heirs.

Defendant No. 1 represents Hara Mohan's branch. Defendant No. 3 represents Raj Mohan's branch. Defendant No. 2 represented Peary Mohan's branch. After his resignation there is no representative of Peary Mohan's branch in the committee as defendant No. 7 is not a representative of Peary Mohan's branch. In the vacancy caused by the resignation of defendant No. 2, the committee should have appointed some body from Peary Mohan's branch in accordance with the direction of the testator. The appointment of defendant No. 7 in place of defendant No. 2 is, therefore, invalid. But as this appointment was made by all the members of the committee and as the plaintiffs have abandoned this prayer for removal of the other members of the committee on this ground I am not prepared to remove the defendant No. 1 on this ground.

For the reason given above, I hold that defendant No. 1 is not liable to be removed from his office as a member of the committee.

There was a dispute between the parties as to whether the 3 bighas 2 cottas of land with the buildings thereon and the 4 chattaks of land to the east of the Grand Trunk Road will revert on the death of defendant No. 1 to Joy Kissen's estate absolutely. The District Judge has held that this property will revert after the death of defendant No. 1 to Joy Kissen's estate absolutely. The defendants Nos. 1 and 2 have assailed this finding of the District Judge in their cross-objections.

The decision on this question is not necessary for the disposal of this suit. The finding of the District Judge on this point is therefore set aside and the question is left open.

The appellants and the respondents did not urge before us the other grounds taken in the memorandum of appeal and cross-objections filed by them respectively in this Court.

The result, therefore, is that the appeal and the cross-objec-

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tions are allowed in part. The judgment and decree of the trial Judge are modified in the manner indicated above. Defendants 1 and 3 to 6 are directed to appoint a person in place of defendant No. 2 as a member of the Managing Committee of the Library keeping in view the provisions contained in paragraph 13 of Joy Kissen's last Will.

In view of the facts and circumstances of this case we direct the parties to bear their own costs in this Court.

Rau, J.: I agree and would like to add a few words.

The case concerns the Utterpara Public Library, an endowment famous in Bengal and mentioned even in the Encyclopædia Britannica, which describes Utterpara as "famous for the Public Library founded and endowed by Joy Kissen Mukherjee, which is specially rich in books on local topography" (11th Edition: See under Utterpara). It appears from Exhibit 245 that the founder conceived the idea of such a Library as early as 1854 and actually established it in 1859, constructing a magnificent building for the purpose on the bank of the Hooghly and spending more than a lakh of rupees on books.

By certain provisions of his last Will dated July 11, 1879 he set apart for the use of the Library the greater part of the ground floor of this two storied building, some out-houses and also, it is contended by the plaintiffs "a flower garden on the eastern side of the Library". The main controversy in this appeal is, or at any rate, during most of the argument, was, with regard to the flower garden. According to the plaintiffs appellants it is part of the trust property set apart for the use of the Library; according to defendants 1 and 2 (who are amongst the respondents) it is not part of the trust property.

It is not in dispute that the flower garden existed at the date of the Will and continued to exist until about 1905, but the flowers have long since disappeared and what now remains is two grass plots with a passage in the middle leading down to the river.

The relevant provisions of the Will are contained in paragraphs 12, 13, 14 and 15.

Paragraph 12 of the Will, after referring to the two-storied building, goes on to say (as translated in the District Judge's judgment): "The public Library rooms having been located on the ground floor of this building and the Baithakhana having been located on the floor above, books are collected on the ground floor and newspapers and books etc. are purchased from time to

time and they are being read and used and shall be read and used by the general public according to special rules". Then comes a somewhat obscure and controversial provision, which, according to one reading, gives the ownership of the land and the building to the testator's grandson Rash Behari Mukherjee and his heirs or successors; but it is provided that none of them shall have the right to remove the public Library from the ground floor.

Paragraph 13 provides that although the aforesaid grandson and his heirs or successors shall be the owners of the land and the building (the precise translation of this part of the paragraph is also disputed), certain rooms and varandahs on the ground floor are to "appertain" to the public Library. Then follows a provision as to how the expenditure of the Library is to be met. The testator then goes on to say that the Library is to be administered by a committee of not more than six members including the eldest male heir in the line of each of the testator's sons (of whom there were three).

Paragraph 14, describes the property out of whose income the expenditure of the Library is to be met.

Paragraph 15 is in the following terms (as translated in the District Judge's judgment):

"The members of the committee shall have no right to the rooms on the upper floor and the lower floor of the Library; my grandson Rash Behari Mukherjee shall have the right to these rooms but he shall have no power to sell them. The pucca kitchen, the stable and the rooms for the Durwans on the northern and southern side of the building are set apart for the residence of the servants of the Library and the servants of the Baithakhana on the floor above the Library. Rash Behari Mukherjee or his representative shall meet from the Library funds the cost of repairing these rooms. The flower garden on the eastern side of the Library shall be under the management of the committee. The expenses on account of the garden and on account of the repairs of the Library rooms shall be met from the Library funds".

The Bengali word translated above as "management" is "Kartritwa"; it is said on behalf of the plaintiffs-appellants that a better rendering would be "control".

It will thus be seen that the testator in express terms placed the flower garden under the control or management of the committee. It is common ground that the members of the committee are the trustees of the public Library in the sense that the use

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of the ground floor rooms and varandahs vests in them for the benefit of the Library, so that the position is that the flower garden has by the terms of the Will been placed under the control or management of the trustees of the Library. The question is whether it can be said to be part of the trust property.

The main contention on behalf of the defendants Nos. 1 and 2, who are amongst the respondents in this appeal, is that the flower garden finds no place in paragraph 13 of the Will, which describes the property "appertaining" to the public Library. Accordingly, it is said the garden must be held not to "appertain" to the Library. Further, it is said, by virtue of the opening sentence of paragraph 13 of the Will, the ownership of the land vests in the testator's grandson and his heirs. The result is that the ownership of the garden, unlike that of the property appropriated to the Library under paragraph 13 vests in them without any subtraction as to use, and the garden cannot therefore form part of the trust property.

To my mind this argument is unconvincing. The most that can be inferred from the non-mention of the garden in paragraph 13 of the Will is that it does not appertain *exclusively* to the Library, as do the gronnd floor rooms and varandahs mentioned in that paragraph; but it does not follow that the garden does not appertain jointly to the Library and the Baithakkhana. It is easy, and may often be necessary, to partition a building by floors and allocate one floor to one purpose and another floor to another purpose. This is what the testator has done in paragraph 13 of the Will. But it is neither necessary nor convenient to make a corresponding partition of a garden in the compound of the building. It is therefore not surprising that the testator did not attempt any such thing in the case of the flower garden. The natural presumption is that a garden in the compound of a building is intended for the benefit of all the occupants of the building, unless there are words allocating the whole of it to the occupants of some particular floor. There are no such words in the Will and we are, therefore, entitled to infer that the garden appertains to both the Library and the Baithakkhana. There are several circumstances in the present case which supports this view and which show that the Library was not intended by the testator to be excluded from the amenities of the garden. In the first place it is obvious that when a garden in the compound of a public Library is placed under the control or management of the Library Committee, that in itself is an indication of the founder's intention that the garden

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must be managed primarily for the benefit of the Library. It would be contrary to all reason to suppose that after endowing a Library of great distinction in an imposing building on one of the finest sites available in the locality, the founder, when he came to dispose of the garden immediately adjoining the building, disposed of it for the exclusive benefit of somebody else, notwithstanding the fact that he has expressly given the control or management of the garden to the Library Committee. A man who has not spared expense or effort in providing various special amenities can hardly have intended to exclude the Library from the ordinary amenities of a garden. In the next place it is significant that the testator has expressly directed that expenses of the management of the garden must be met from the Library fund. In the third place, when we look to the actual use that has been made of the garden and its site, we find that the evidence is all one way, namely, in favour of the Library. It has already been mentioned that the flower garden has, for some reason or other, been allowed to disappear; on several occasions since its disappearance the site has been allowed to be used for other purposes. On two or three occasions, the committee went so far in their vandalism as to let it out to circuses and the like, but at no time have they ventured to appropriate the income arising from such use to any purpose save that of the Library fund. Yet another piece of evidence is furnished by Ex. M (1), a lease granted by the founder in 1862 in which the western boundary of the land leased is described as "the land of the flower garden appertaining to the Library". This was of course many years before his Will of 1879; but no particular reason can be discovered for any change of intention on his part and as already pointed out, the indications are all the other way.

In view of all these circumstances, the conclusion seems irresistible that the garden was intended by the testator to appertain at least in part to the Library and to my mind this intention has been indicated with reasonable certainty (to use the language of Section 6 of the Indian Trusts Act) in the provisions of the Will. The garden must, therefore, to that extent be regarded as part of the trust property.

It is clear from the opening sentence of paragraph 13 of the Will that what appertains to the Library in respect of the ground floor rooms and varandahs is something less than the ownership, because otherwise there would be no meaning in describing the [owne]rship as remaining with the testator's grandson and his heirs

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or successors. What appertains to the Public Library under paragraph 13 would, therefore, appear to be only the use of the ground floor rooms and varandahs; and in my view, what appertains to the Library by the implications of paragraph 15 is the joint use of the garden, the manner and extent of the use being regulated by the Library Committee in the exercise of the powers of control or management given to that committee by the aforesaid paragraph 15.

Towards the conclusion of the argument, we were pressed by the Advocate for the respondents to leave open the question whether the flower garden is or is not part of the trust property.

He urged that as there was admittedly a trust and as there was admittedly some trust property, it was necessary in the particular circumstances of present case to decide whether the garden is or is not included in the trust property.

We cannot however ignore the fact that this particular question was a part of issue No. 7 framed by the trial Court. Evidence was produced upon it; the District Judge has recorded a finding (in the negative) in respect of it; and a large part of the argument before us was devoted to it. Moreover we cannot tell what the findings upon the other issues may be, in the event of an appeal from the decision of this Court. It seems to me, therefore, that in accordance with the observations of their Lordships of the Judicial Committee in *Tarakant Bannerjee* v. *Puddomoney Dossee* (1) repeated in *Mohomed Solaiman* v. *Birendra Chandra Singh* (2), we are bound to record our opinion on this particular issue as on other important issues.

A. T. M.

Appeal & Cross-objections allowed in part.

(1) (1866) 10 M. I. A. 476 (486); 5 W. R. B. C. 63.

(2) (1922) L. R. 50 I. A. 247; I. L. R 50 Calc. 243; 37 C. L. J. 561.

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THE ESSENTIAL ELEMENT IN MARRIAGE UNDER HINDU LAW.

[By Mr. Prabodh Chandra Chatterjee, M.A., B.L.]

Though we generally speak of the marriage ceremony in the singular, as a matter of fact marriage means the performance of a number of ceremonies. These broadly fall under four heads—(1) The Nandi-Sradh or rather the two Nandi-Sradhs or offerings to the manes, one performed on the bride's and the other performed on the bridegroom's side ; (2) The gift of the bride to the bridegroom for the purpose of marriage and the acceptance of the bride by the bridegroom, collectively called the *Sampradan* by learned people and *Bibaha* or marriage by ordinary people ; (3) *the Baibahika Homa* or offering to the Sacred Fire and (4) *the Panigrahan and Saptapadigaman* ceremonies, the junction of the hands of the bride and bridegroom, while taking the seven steps, with the utterance of the Vedic Mantras, which are mainly invocations or prayers to the gods, by the bridal pair, for happiness and prosperity, benedictions etc. (The clasping of the hand of the bride by the bridegroom is an ancient Indo-European marriage custom—Vide—A history of Indian Literature by M. Winternitz, p. 108. Taking seven steps together signifies friendship.—Vide Do. p. 212). Items (3) and (4) are collectively called *Kusundika* by the Hindus in Bengal.

After this *Kusundika*, some further ceremonies, called the *Uttar-bibaha* or after-marriage ceremonies have also to be gone through.

Every one of these items contributes in some measure to the *Sanskara* or purification, the status of the wife or the husband as the case may be, and is thus conducive to wifehood or husbandhood.

The question is—Which of these ceremonies is the *Pradhan* or essential element in marriage, on failure of which the marriage fails i. e. is invalid and void ?

The Hindu lawyers are unanimous that the religious ceremonies of the Nandi Sradh and the Baibahika Homa are not the essential elements in marriage but are merely *Angas* or subordinate parts of the marriage ceremony.

The Lawgivers themselves make this quite clear. The Brahma Purana says :—নান্দীমুখেভ্যঃ শ্রাদ্ধন্তু পিতৃভ্যঃ কার্য্যমৃদ্ধয়ে। ততো বিবাহঃ কর্ত্তব্যঃ শুদ্ধঃ শুভসুতপ্রদঃ॥ (Vide the Udbahatatta, para 37, p. 56), which means—"The Nandi Sradh in honour of the manes should be performed for (procuring) prosperity (for the bridal pair). Marriage commenced with the performance of the Nandi Sradh is (ceremonially) pure and procures a good son (for the married pair)". This by itself shows that the preliminary ceremony of the Nandi Sradh is not the essential element in marriage. Commenting on the text, Raghunandan says :—শ্রাদ্ধেন বিবাহস্য শুদ্ধত্বাভিধানেন তদভাবাৎ অশুদ্ধত্বপ্রতীতেঃ। (Vide the Udbahatatta, para 37, pp. 56—57), which means—"(As) the text lays down that the (performance of the) Nandi Sradh ensures the (ceremonial) purity of marriage and that in its absence (i. e. the absence or non-performance of the Nandi Sradh) the marriage is considered to be (ceremonially) impure".

The Nandi Sradh therefore only ensures the ceremonial purity of marriage and in case of its non-performance the marriage is considered to be অশুদ্ধ i. e. ceremonially impure and not অসিদ্ধ or invalid.

Then as regards the Homa, Manu says :—মঙ্গলার্থঃ স্বস্ত্যয়নং যজ্ঞশ্চাসাং প্রজাপতেঃ। প্রযুজ্যেত বিবাহেষু প্রদানং স্বাম্যকারণং। (Vide Manu, Ch. V, verse 152, cited in the Udbahatatta, para 31, p. 44 and Golap Chandra Sarkar Shastri's Hindu Law, 6th Edition, p. 115). This verse is translated by the learned author, Golap Chandra Sarkar Shastri, as follows—"The recitation of the benedictory sacred texts, and the sacrifice (the Homa in the nuptial fire) in honour of (the god) Prajapati (= Lord of Creatures) are used in marriages for the sake of procuring good fortune (to the bride); but the gift (by the father) is the cause of the status of husband (or the marital dominion of the husband)" (Vide Do. p. 116). Raghunandan says :—যজ্ঞশ্চ প্রজাপতিদৈবত্যো বৈবাহিকো হোমস্তৎ সর্ব্বং মঙ্গলার্থং। অভিমতার্থসিদ্ধির্মঙ্গলং তদর্থমবৈধব্যার্থ মিতি যাবৎ। (Vide the *Udbahatatta*, para 31, p. 45) which means "The Jajna or sacrificial ceremony is the Baibahika, i. e. the marriage Homa, in honour of the god Prajapati i. e. the Lord of Creatures, which (with the benedictory texts) is all for the sake of *Mangala*, i. e. for attaining the desired result, namely the averting of widowhood".

The Homa therefore is not the essential element in marriage.

The *Uttarabibaha* or after-marriage ceremonies cannot, as the very name indicates, be the essential element in marriage.

There remain therefore only the gift and acceptance of the bride and the junction of their hands while taking the seven steps, or as a variant of this, at the seventh step, with the utterance of the sacred Vedic Mantras or texts, and we have to consider which of these ceremonies is the essential element in marriage.

We have already seen that the utterance of the Vedic Mantras in marriage, as of Mantras generally, is not an essential, but only a subordinate element of the ceremony. That is the view not only of Raghunandan but also of older lawyers whom he cites. Medhatithi, the old commentator of Manu, is also of the same opinion, his view being, as we have seen, that it is the junction of the hands of the bride and bridegroom, and not the utterance of the sacred Vedic texts, that constitutes the essential element in marriage. Mahamohapadhyay Chandrakanta Tarkalankar, while challenging Raghunandan's view that it is the acceptance of the bride by the bridegroom that constitutes the essential element in marriage and putting forward the view that the *Panigrahana* or the junction of the hands of the bride and the bridegroom is the essential element in marriage, does not hesitate to admit that the utterance of the sacred Vedic texts is only an *Anga* or subordinate element of *Panigrahana* or the junction of hands and hence of marriage itself. He points out that Govial's Grihyasutra plainly states that the utterance of the Vedic texts is an *Anga* or subordinate element of *Panigrahana*. He says :—পাণিগ্রহণিকা মন্ত্রা বিবাহ-কর্ম্মাঙ্গভূতা ইতি বদদ্ভিঃ রত্নাকরকারৈরপি ভঙ্গ্যা পাণিগ্রহণস্য বিবাহকর্ম্মত্বমঙ্গীকৃতং তত্রৈব তেষামঙ্গত্বাৎ। * * * তথাচ তাবদঙ্গোপেতং পাণিগ্রহণং বিবাহঃ। গৃহ্যকারৈঃ পাণিগ্রহণমুপক্রম্য অন্যস্য ইতিকর্ত্তব্যতয়া উপদেশাৎ। (Vide the Udbaha-Chandraloka, pp. 5·6), which means "The author of the Ratnakar, stating that the Mantras (i. e. the sacred Vedic texts) uttered at the time of the Panigrahana (i. e. the junction of the hands of the bride and the bridegroom) constitute an *Anga* (i. e. a subordinate element) of marriage, in a manner admits that the Panigrahana is (i. e. constitutes) marriage, the Vedic Mantras forming a subordinate part thereof. * * * * Thus the Panigrahana with these subordinate elements is marriage, the author of the Grihyasutra, while dealing with the subject of Panigrahana, having pronounced the procedural (i. e. subordinate) character of the other elements".

According to this view, even the Saptapadigamana would be a subordinate part of the ceremony. Chandrakanta says :—সপ্তপদাগমনং পাণিগ্রহণস্য অঙ্গং ইত্যভিপ্রায়ঃ। (Vide the Udbaha-Chandraloka, P. 4), which

means—" The intention is that the Saptapadigamana or the taking of the seven steps is an Anga or subordinate element of the Panigrahana."

In this connection it is interesting to note that " in England the rule has been laid down that where a marriage is celebrated *in facie ecclesiae, it is not essential that all the words of the marriage service to be repeated by the man and woman should be actually said;* but the ceremonies required by law are complied with, *when the hands of the parties are joined together,* and the clergyman pronounces them to be husband and wife, if they understand that by that act, they have agreed to cohabit together and with no other person." (Vide the Law and Practice relating to Marriages in India and Burma, by S. Krishnamurti Aiyar, Preface, P. III). The italics in the quotation are ours.

The question now reduces itself to this viz., whether the gift and acceptance of the bride or the junction of their hands is the essential element in marriage.

The lawgivers themselves make it quite clear that the essential element in marriage is neither the Nandi Sradh nor the Baibahika Homa, nor the Saptapadigaman nor the utterance of the sacred Vedic texts. The Narada Smriti, cited by Chandra Kanta says:— বরণাৎ গ্রহণং পাণেঃ সংস্কারোহয়ং দ্বিলক্ষণঃ। (Vide the Udbaha-Chandraloka, P. 2), which means—" After the gift of the bride to the bridegroom, (comes) the Panigrahana, or the junction of the hands of the bride and the bridegroom. The Samskara (or purification) of marriage has these *twofold* signs or characteristics."

This text seems to lay down that the gift (involving acceptance) of the bride as well as the Panigrahana are *both* essential in marriage. The other factors, though conducive to wifehood, are not *essential.*

There are other texts however which seem to make out that it is the Panigrahana ceremony which is the essential element in marriage.

There are express texts in the Smritis to the effect that the girl given in marriage could be repudiated, after the gift (and acceptance), but before the Panigrahana, for certain defects, such as insanity, leprosy, loss of virginity or the like, but no such repudiation was possible, inspite of the existence of these defects in the girl, after the Panigrahana ceremony which made the marriage irrevocable. The defects for which a girl could be repudiated, after gift but before Panigrahana, we find recited in verse CCV of

Chapter VIII of Manu. (Vide Dr. Ganganath Jha's Manu-Smriti, Volume IV, Part II, P. 25).

Medhatithi, the well-known commentator of Manu, in his commentary on verse CCXXVII, Chapter VIII of Manu says:— "When the seventh step has been thus taken by the bride, there can be no revoking, either on the part of the bride's father or on that of the bridegroom. So that even though she be insane, she has to be taken as 'wife' and cannot be abandoned," except in the case of a girl, "who happens to be 'within the Sapinda-relationship' to the bridegroom". (Vide Dr. Ganganath Jha's Manusmriti, Vol. IV, Part II, Pages 274-275). Jagannath Tarkapanchanan is also of the same opinion. (Vide Colebrook's Digest, which is a translation of Jagannath's Bibada-Bhangarnaba, Vol. II, Book IV, Chapter IV, Section III, Verse 184, Page 178).

A girl repudiated for those defects after gift and acceptance but before the Panigrahana, could, in ancient times, be given again in marriage to another, though such marriage was looked down upon. She used to be called *Punarbhu* i. e. a twice married or remarried girl.

If the bridegroom died after the gift and acceptance but before the Panigrahana, in that case also, the girl could be given in marriage to another. Basistha says:—অদ্ভির্বাচা চ দত্তায়াং ম্রিয়েতোর্দ্ধং বরো যদি। ন চ মন্ত্রোপনীতা স্যাৎ কুমারী পিতুরেব সা ॥ (Vide the Udbahatatta, Para. 31 Page 43), which means—"If the bridegroom dies after verbal betrothal or after the gift with water but before she has been married with the utterance of the (Vedic) Mantras, (i. e. before Panigrahana), she remains the maiden daughter of her father (i. e. she can be given in marriage to another.")

It is no wonder, therefore, that not only Medhatithi but other Digest makers also, considered that it was the Panigrahana ceremony, making the marriage irrevocable, that was the essential element in marriage. There are other texts which seem to lend support to this view. Manu says:—পাণিগ্রহণিকা মন্ত্রা নিয়তং দারলক্ষণং। তেষাং নিষ্ঠাতু বিজ্ঞেয়া বিদ্বদ্ভিঃ সপ্তমে পদে। (Vide Verse CCXXVII, Ch. VIII, of Manu cited in the Udbahatatta, Para. 31, P. 44), which is translated by Dr. Ganganath Jha as follows:—"The marriage texts are clearly conducive to wifehood; and these are to be recognised by the learned as completed at the seventh step." (Vide Dr. Ganganath Jha's Manu Smriti, Vol. IV, Part II, P. 274).

Narada says:—কন্যোরনিয়তং প্রাহ বরণং দোষদর্শনাৎ। পাণিগ্রহণমন্ত্রাশ্চ নিয়তং দারলক্ষণং। (Cited by Chandrakanta in his Udbaha-Chandraloka Pages 2-3) which means:—"Of these (i. e. the gift and the Pani-

grahana), the gift is not a sure and certain sign of wifehood, by reason of defects (in the bride), for which the girl may be repudiated). The Mantras uttered at the time of Panigrahana constitute a sure and certain sign of wifehood (as the girl cannot be repudiated after Panigrahana, whatever her defects may be). "

Jama says :—নোদকেন ন বাচা চ কন্যায়া পতিরিষ্যতে। পাণিগ্রহণ সংস্কারাৎ পতিত্বং সপ্তমে পদে। (Vide the Udbahatatta, para 31, page 44), which means—"The status of the husband is conferred, neither by the *bagdan* or verbal betrothal, nor by the gift with water. The status of the husband is conferred by the Panigrahana at the seventh step. "

This appears to settle the question as to what constitutes the essential element in marriage, *so far as the twice-born castes are concerned.* For it is admitted on all hands . that Panigrahana is not even an *Anga*, or subordinate part, far less the essential element, of the marriage ceremony amongst the Sudras. Nor is the Homa a part of such marriage. The reason for dispensing with the Homa and Panigrahana ceremonies in Sudra marriage is that the Sudras have not the right to utter the Vedic Mantras which are parts of those ceremonies. Medhatithi says :—ন তেষাং মন্ত্রাঃ সন্তি, মন্ত্রবর্জ্জং সর্ব্বমেবেতি কর্ত্তব্যতাস্তি। (Vide Medhatithi's commentary on the 4th Verse, Chapter III, of Manu, page 129), which means :—" They (the Sudras) have no Mantras (i. e. have not the right to pronounce the Vedic Mantras) ; the procedure (for marriage in their case) leaves out the Mantras. " The Sudra marriage, without the Homa and Panigrahan ceremonies, is perfectly valid, according to Hindu Law, and it is wrong to imagine that in the eye of Hindu Law, the Sudra marriage is only legalised concubinage.

It is remarkable, however, that from before the time of Medhatithi, who is centuries older than the author of the Mitakshara, there has been a school of Hindu lawyers, which has been of opinion that it is the acceptance of the bride by the bridegroom, and not the Panigrahana, that constitutes the essential element in marriage. Medhatithi refers to this view, which he controverts. He says :—অতো বিবাহঃ কন্যাস্বীকারার্থঃ। তদযুক্তং স্বীকৃতায়াঃ বিবাহঃ ভার্য্যাকরণার্থঃ। নানেন কর্ম্মণা প্রতিগৃহ্নীয়াৎ ইতি বিধিরস্তি। (Vide Medhatithi's commentary on the 27th Verse of the 3rd Chapter of Manu, page 204), which means :—" Hence marriage means (according to some whose view Medhatithi challenges) the acceptance of the bride. That (view) is not maintainable, as marriage means (the purification and status of) wifehood conferred on the accepted bride (i. e. the bride, after acceptance). (Further) there is no precept to the effect that the

acceptance (of the bride) should be made according to such and such procedure or ceremony. "

Raghunandana, the great Bengal lawyer, belongs to the school whose view is thus challenged by Medhatithi. Raghunandan says :— ভার্য্যাত্বসম্পাদকগ্রহণং বিবাহঃ। (Vide the Udbahatatta, para 2, page 2), which means :—" Marriage is the acceptance (of the bride) conferring wifehood (on her). " According to Raghunandan this acceptance is primarily mental ; স্বীকার রূপ জ্ঞান বিশেষস্থ ; he says :—(Vide the Udbahatatta para 2, page 2) it means :—" (Of) the particular kind of apprehension (which is mental) called acceptance.". Raghunandan's scholiast Kasiram says that, according to Raghunandan, the essential element in marriage is the mental (act of) acceptance by the bridegroom of the bride as the wife. জ্ঞান বিশেষ এব বিবাহঃ He says :—(Vide Kasiram's commentary on para 2 of the Udbahatatta, page 2). It means—" Marriage is a particular kind of apprehension which is mental. " Raghunandan cites Manu's well-known Verse—পাণিগ্রহণিকা মন্ত্রা নিয়তং দারলক্ষণং। তেষাং নিষ্ঠা তু বিজ্ঞেয়া বিদ্বদ্ভিঃ সপ্তমে পদে। Referred to above and reconciles it with his view in this way. ইতি মনুবচনং তদ্বিবাহগত বিশেষ সংস্কারার্থং। (Vide the Udbahatatta para 5, page 6), which means—" This verse of Manu (referring to the Vedic Mantras uttered at the time of the Panigrahana ceremony as the sure and certain sign of wifehood), is (i. e. provides for) a special purification in marriage." This means that in Raghunandan's opinion the Panigrahana with the utterance of the Vedic texts is a ceremony of special purification but is not the essential element in marriage. The essential element, according to Raghunandan, is the acceptance of the bride by the bridegroom. The Panigrahana ceremony no doubt makes marriage irrevocable and in that sense may be said to be the sign of an irrevocable marriage, but the essence of marriage, Raghunandan would say, is not its irrevocability but something else, namely, the acceptance of the bride by the bridegroom as wife. As to Jama's text, referred to above, about the status of the wife and of the husband being conferred at the seventh step, Raghunandana cites a Smriti text from Laghuharita, to show that it means the entire wifehood or husbandhood, as the case may be, and does not imply that a *sufficient* part of the purification or status is not secured by gift and acceptance of the bride. In other words, the Panigrahana ceremony secures *sixteen annas* result ; but the gift and acceptance secure the *eight annas*, sufficient for the recognition of the bride as wife and of the bridegroom as husband. Raghunandan says :—লঘুহারীতঃ। তথাপি পাণিগ্রহণেন জায়াত্বং কৃৎস্নং হি জায়াপতিত্বং সপ্তমে পদে ইতি। বিবাহস্তু পাণিগ্রহণাৎ পূর্ব্বং বৃত্ত এব বেতি।

(Vide the Udbahatatta, para 5, p. 6). It means—"Laghuharita cited by the (Digest called) Ratnakara has expressed this clearly. 'The wifehood is (conferred) by the Panigrahana (ceremony). That means that the entire wifehood and husbandhood accrue at the seventh step (of the Saptapadigamana)'. Marriage, however, (conferring a *sufficient* part of the status) takes place before the Panigrahana (ceremony)".

That the Panigrahana ceremony is not the essential element in marriage is further proved by the fact that it is directed only in cases, where both the bride and the bridegroom belong to the same section of the twice-born caste, i. e. in cases where both the bride and bridegroom are either Brahmanas or Kshatriyas or Baishyas. Where the bride is lower in rank, she has to take hold not of the bridegroom's hand but of an arrow, in case she is a Kshatriya, of a wooden stick called 'Panchani' in common parlance, in case she is a Baishya, and of the border of the husband's cloth, in case she is a Sudra. This clearly shows, according to Raghunandana, that the Panigrahana or the junction of hands ceremony is not the essential element in marriage. He cites the text on the subject from Manu : পাণিগ্রহণসংস্কারঃ সবর্ণাসূপদিশ্যতে অসবর্ণাস্বয়ং জ্ঞেয়ো 'বিধিরুদ্বাহকর্মণি। শরঃ ক্ষত্রিয়য়া গ্রাহ্যঃ প্রতোদো বৈশ্যকন্যায়া। বসনস্য দশা গ্রাহ্যা শূদ্রয়োৎকৃষ্ট বেদনে। ইতি মনুবচনান্তরয়োরপি উদ্বাহপাণিগ্রহণয়োঃ পৃথকত্বং প্রতীয়তে। (Vide the Udbahatatta para 5, p. 6). It means—" 'The purification caused by the Panigrahana ceremony, (i. e. the ceremony of the junction of hands of the bride and the bridegroom) is directed only in the case of persons of the same caste (excluding of course Sudras). In the case of persons belonging to different castes, be it known that this is the precept relating to such marriage (i. e. this is the procedure to be observed in the case of marriage of persons belonging to different castes). The Kshatriya bride has to take hold of the arrow ; the Baishya bride has to take hold of the wooden stick called 'pratoda, (or Panchani) and the Sudra bride, in case of her marriage with a person of a higher caste, has to take hold of the border of the cloth (of the bridegroom)'. The difference between marriage and the Panigrahana ceremony is clear from this other text of Manu."

In ancient times, when the 'patria potestas' was a living institution, the gift of the bride passed the dominion of the father over his daughter to the husband. Manu, as we have seen, says :—প্রদানং স্বাম্যকারণং—which may be translated as follows............ "The gift is the cause of the marital dominion". In ancient times, therefore, the Panigrahana ceremony i. e. the junction of the

hands of the bride and bridegroom, after the Homa, might have been considered to be essential in marriage. But in later times, with the gradual disappearance of the 'patria potestas', the gift in marriage became more or less figurative and devoid of the meaning which was attached to it in ancient times. This in fact is admitted even by an orthodox Hindu lawyer like Nanda Pundit, the author of the Dattaka-Mimansa. 'Gift in marriage is figurative', he says (Vide Sutherland's Dattak Mimansa, Section II, Para 39, p. 30). Gift came, in fact, to be indistinguishable from marriage. This is pointed out by Raghunandan's scholiast Kasiram. He says :—প্রাক্ * * বিবাহস্য সুতরাং দানবৃত্তিতা। (Vide Kasiram's commentary on para 4 of the Udbahatatta, p. 3), which means........."The eastern (i. e. the Bengal) lawyers * * * hence (opine) that marriage results from the gift". As a matter of fact, in Bengal at least, the ceremony of gift and acceptance is called marriage. The *Homa*, Panigrahana and the Saptapadigaman ceremonies, collectively called the *Kusundika*, are performed a day or two afterwards, and though recognised to be parts of the marriage ceremony, are not popularly called marriage.

Raghunandan's scholiast Kasiram further points out that the older form of the Mantra expressive of the gift of the bride to the bridegroom clearly shows that the gift was regarded as indistinguishable from marriage. The Mantra was শুভবিবাহেন দাতুং—which means "for the purpose of giving in auspicious marriage". The word '*Bibaha*' (marriage) is used in the instrumental case which, according to the rule of Sanskrit Grammar, indicates that marriage is indistinguishable from the gift. Kasiram says :—অতএব প্রাচীনানাং শুভবিবাহেন দাতুমিতি বাক্যরচনাপি সঙ্গচ্ছতে। ধান্যেন ধনবান্ ইত্যাদাবিব তৃতীয়ায়া অভেদার্থকত্বাৎ। (Vide Kasiram's commentary on para 4 of the Udbahatatta p. 4), which means "Hence the construction by the ancients of the sentence—'*Shuvabibahena datum*' (For the purpose of giving in auspicious marriage)—is consistent (with this view); as the use of the instrumental case (in the word '*Shuvabibahena*') connotes identity (of the marriage with the gift), as for example, in the case of the expression '*Dhanyena Dhanaban*', which means—possessor of wealth in the shape of paddy ;—the use of the word 'Dhanya' (paddy) in the instrumental case connotes its identity with wealth".

Gift of course implies acceptance. Raghunandan says :—মন্বাদিবচনে যদ্দানপদং তৎ* * গ্রহণপরং (Vide the Udbahatatta, para 3, p 3) which means—"The word 'gift' in the texts cited from Manu and others * * * connotes acceptance (also)." We have already

seen that gift is incomplete until it is accepted by the donee; because if the donee refuses to accept the gift the donor may take it back. Therefore the view that gift is the essential element in marriage means that it is only the gift perfected by acceptance that may be so considered. As the gift is perfected by acceptance, Raghunandana has taken acceptance to be the essential element in marriage. Raghunandana cites a passage from Haribamsa, the well known appendix to the Mahabharata, to show that after acceptance, the bride was considered to have acquired the status of wifehood, even before the performance of the Panigrahana ceremony. The passage is this: পাণিগ্রহণমন্ত্রানাং বিঘ্নং চক্রে স দুর্ম্মতিঃ। যেন ভার্য্যা হৃতং পূর্ব্বং কৃতোদ্বাহা পরস্য বৈ। (Vide the Udbahatatta, para 5, p. 6). The text means—"That miscreant, by stealing the wife before the utterance of the Panigrahana Mantras (i. e. before the performance of the Panigrahana ceremony) put an obstacle to their utterance". Raghunandana points out that this clearly indicates that the bride given in marriage attains the status of the wife before the performance of the Panigrahana ceremony.

As for Basistha's text to the effect that if the husband died after acceptance of the bride, but before the performance of the Panigrahana ceremony, the bride could be given in marriage again to another, Raghunandana would say that it only provides for a special case allowing remarriage in case of the husband's death after acceptance of the bride but before the Panigrahana ceremony and does not really go against his view that the acceptance of the bride is the essential element in marriage. If the Panigrahana ceremony were the essential element, there would be no marriage in such a case and the girl would be free to marry another and there would be no necessity for providing for the contingency mentioned in Basistha's text which would, in that case, be altogether superfluous and meaningless.

There remains one other objection to Raghunandana's view which has to be answered. If the acceptance of the gift is to be regarded as the essential element in marriage, it must be shown that there is a Smriti precept enjoining such acceptance. The acceptance of the bride must be in obedience to a precept. Otherwise it would be an optional matter which cannot be said to be the essential element in marriage. This is the objection raised by Medhatithi, as we . have seen. Raghunandana controverts such objection by citing a Smriti text enjoining the acceptance of the girl gifted to the bridegroom.

Before we cite the text, however, it may be remarked that as there are precepts enjoining the gift of the bride to a suitable bridegroom in the Brahmo form of marriage, a precept enjoining acceptance of the former by the latter, should, according to Mimansa principles, be presumed. A student of the Mimansa is familiar with *Kalpya Bidhi* and *Nishedh* i. e. positive and negative precepts which have to be presumed in certain cases. (Vide Sarkar's T. L. on the Mimansa Rules of Interpretation, p. 339). If it is a duty of the father of the bride to make a gift of her in marriage to a suitable bridegroom, it is no less a duty on the part of the bridegroom to accept such gift, after the verbal betrothal, if the girl is free from any defect for which she may be repudiated. If there is a precept, therefore, enjoining the gift, a similar precept enjoining acceptance of the gift should be presumed, even if no such express precept is to be found in the Smritis.

According to Raghunandan, however, there are express precepts in the Smritis enjoining acceptance of the gift of the bride in marriage. He cites the following—অতঃ পরং সমাবৃত্তঃ কুর্য্যাদ্দারপরিগ্রহং। (*Vide* the Udbahatatta, para 2, p. 1), which means" On return from the preceptor's house, on the conclusion of his studies, (he) should accept a (girl as his) wife."

Raghunandan's view that the acceptance of the bride by the bridegroom is the essential element in marriage derives additional support from the well known *Kalibarjjya* texts cited by him from the Brihannaradya and the Adi Puranas. The *Kalibarjjya* texts deal with practices which are forbidden in this Kali age The remarriage of girls which was allowed, under certain circumstances, in ancient times, as Manu's and Jajnavalkya's Codes clearly show, is one of them. The text in question is this. দত্তায়াশ্চৈব কন্যায়া পুনর্দানং বরস্য চ (*Vide* the Udbahatatta, para 14, p. 15) which means "Gift over again of a maiden once given to the bridegroom (is prohibited in the *Kali* age)". This clearly implies that marriage results from the acceptance of the first gift, thus barring the second gift and the consequent remarriage of the already married girl.

If the Panigrahana ceremony be taken to be the essential element in marriage, what would be the fate of a girl given to and accepted by the bridegroom, if the latter dies after acceptance of the gift, but before the performance of the Panigrahana ceremony, or worse still, if he refuses to perform the Panigrahana ceremony, after accepting the gift?

If the Panigrahana ceremony be taken to be the essential

element in marriage, the girl in such a case would be in the unenviable position of being neither a maid, nor a married woman, nor a widow. She cannot again be given in marriage to another, nor can she inherit the property of the bridegroom who is dead nor claim anything from the estate left by him for her maintenance. If the bridegroom deliberately refuses to perform the Panigrahana ceremony, he may be heavily punished by our Courts for his conduct but such punishment will be small compensation to the bride for her lifelong suffering.

Even if our law-courts hold that she is, under such circumstances, free to marry another, there is little chance of such decision overriding immemorial custom, which would not only deny her a second husband but even the comfort and satisfaction of calling herself a married woman.

Raghunandana's view that the acceptance of the gift is the essential element in marriage has been generally accepted by the Bengal lawyers. That is the view of Jagannath Tarkapanchanan, whose work, the '*Bibadabhangarnab*', called Colebrooke's Digest, is well known to students of law (*vide* Colebrooke's Digest Vol. II, Bk. V, Chapter IV, Sec. VIII, p. 391). Krishnanath Nyaypanchanan, the well-known modern Smarta, is also of the same opinion. He says— অতএব গ্রহণাৎ পরং পাণিগ্রহণাদেঃ প্রাক্ কন্যায়া মরণেঽপি গ্রহণস্য বিবাহত্বং গৃহীতায়াশ্চ ভার্য্যাত্বং জাতমেব। পরন্তু সম্পূর্ণভার্য্যাত্বানিষ্পত্তের্নিভিনিবন্ধৃভিশ্চ তন্মরণাৎ ত্রিরাত্রমশৌচমভিহিতং যুক্তমেব। অন্যথা পাণিগ্রহণাদেঃ প্রাক্ বরমরণাৎ গৃহীতকন্যায়াঃ শ্রাদ্ধধনাধিকারদেহাশুদ্ধয়োঃ ন স্যাঃ। (*Vide* the Smriti-Siddhanta, Part II pp. 7-1-72). It means—" Hence, even on the death of the bride, after acceptance (of the gift) but before the Panigrahana and other ceremonies, the acceptance results in marriage and wifehood accrues to the accepted bride. But as the entire wifehood does not accrue, the Asouch resulting from her death has been justly stated by the sages (the Lawgivers) and the Digestmakers to last for three days only (instead of ten days, as would have been the case, if the entire wifehood had accrued to the bride). Otherwise, (*i.e.* in case it be held that no wifehood accrues to the bride in such a case), on the death of the bridegroom, before the Panigrahana and other ceremonies, the bride who is accepted would have no right to perform the Sradh (of the bridegroom) or to inherit his property, nor would her body be impure (impurity of the wife's body on the death of the husband resulting in the same way as impurity of the son's or daughter's body results from the parents' death)".

As a matter of fact, on the death of the bridegroom, after acceptance of the gift but before the Panigrahana ceremony, the

bride is regarded in Hindu society as a widow and no conservative Hindu dreams of giving her in marriage again.

Under these circumstances, Raghunandana's view that the acceptance of the gift results in marriage, should be held to be correct and the view that there is no marriage (unless and) until the Panigrahana ceremony is performed, should be held to be incorrect. The acceptance of the bride is the common factor not only in all forms of Hindu marriage, but also in the forms of marriage prevalent amongst other communities, and Raghunandana's view takes into account the latest Smriti texts and accords with the interpretation of the texts most suited to the change of conditions and the progress of the times, as well as with justice and the universal sense of mankind.

To sum up. The Hindu Lawyers agree that neither the Nandi Sradh, nor the *Homa*, nor the utterance of the Vedic Mantras, nor the Saptapadigamana, nor the Uttara Bibaha, or the post-nuptial ceremonies constitute the essential element in marriage. There is difference of opinion as to whether gift and acceptance of the bride or the Panigrahana or the junction of the hands of the bride and bridegroom constitutes such essential element, so far as the twice-born castes are concerned. As regards Şudras who had no right to utter the Vedic Mantras, it was agreed on all hands that the gift and acceptance of the bride were sufficient for validating the marriage. The gift was indispensable for transferring the *dominion* of the father of the bride over her to the husband. The junction of hands of the bride and bridegroom might, in ancient times, have been considered to be indispensable for the Samskara *i.e.* purification of the bride and bridegroom—in other words, for conferring the status of husband and wife on the bridal pair. But, in course of time, with the decline of the ancient or archaic social system and of the patria potestas, which was a characteristic feature of all ancient social systems, gift and acceptance of the bride for marriage gradually lost their ancient significance and came to be regarded as indistinguishable from marriage and as its essential element. This is the view of the later lawyers who emphasised the importance of *acceptance* of the bride *as wife* by the bridegroom, and openly proclaimed that it was this *acceptance* that was the essential element in marriage. The process started long long ago, as the Haribamsa text cited by Raghunandana shews. The latest advocates of this view are such eminent Hindu lawyers as Raghunandana and Jagannath Tarkapanchanan. It will be most regrettable if this latest development of Hindu law is ignored by our lawyers and Courts.

NOTES OF CASES.

Mansa Ram and Sons (firm) *v.* Hiralal Sanon.

1939. I. L. R. [1940] All. 147.

Limitation Act (IX of 1908), article 85—Mutual, open and current account.

Hiralal and others opened an account with the firm on deposit and subsequently took an overdraft of a larger sum. The suit by firm against Hiralal for its dues was found time-barred by the lower Court. On revision:

Held [per *Rachhpal Singh, J.*]—that an account wherein the balance shifted from one party to the other from time to time is a mutual, open and current account under article 85 and that the suit was not time-barred.

S. C.

Ram Ugrah Ojha *v.* Ganesh Singh.

1939. I. L. R. [1940] All. 153 F. B.

Civil Procedure Code (Act V of 1908) Order 22, rule 4(2), Order 34, rule 5—Court while passing final decree cannot go behind preliminary decree.

Ganesh got a preliminary mortgage decree and on mortgagor's death substituted his heirs, Ram and his son, who objected to the passing of the final decree in their personal capacity as members of the joint family with the mortgagor. The Courts below disallowed the objections. On reference:

Held [per *Thom, C. J.*, *Allsop* and *Ganganath, JJ.*]—that the Court cannot in final decree go behind the preliminary decree and that the objectors can act as legal representatives of the mortgagor and not in their personal capacity.

S. C.

Banwari Lal *v.* Ram Gopal.

1939. I. L. R. [1940] All. 185.

Civil Procedure Code (Act V of 1908) Order 23, rule 3—Consent decree—Section 96(3), appeal.

The parties agreed that if a certain plaintiff be found by Court not to be quite deaf and dumb, her suit will be decreed. The Court found in her favour and decreed her suit. On appeal it was remanded for "decision according to law." On appeal against this order:

Held [per *Bennet* and *Verma, JJ.*]—that it amounted to consent decree against which no appeal lay.

S. C.

Before Mr. Justice A. N. Sen.

PULIN CHANDRA KAYAL AND ANOTHER

v.

SARAT CHANDRA KAYAL AND OTHERS.*

CIVIL

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July, 2, 9

Appeal, if lies—Order, substantially a remand—Civil Procedure Code (Act V of 1908), Sec. 151, O. 41 R. 23.

No appeal lies from an order of remand under section 151 of the Code of Civil Procedure unless such order amounts to a decree.

Although the Court ordering the remand cannot make that order under Order 41 rule 23 of the Code of Civil Procedure, if the order made purports to be an order under Order 41 rule 23 and appears to be in form and substance an order under the said rule, it is to be regarded as an order of remand passed under rule 23 and hence subject to appeal.

Jagathari Saha v. *Medini Mohan* (1) followed.

Whan an appellate Court affirms the decision of the trial Court, there can be no objection if it adopts the language of the trial Court.

Appeal by the Pro-forma Defendants.

Suit for a declaration.

The material facts appear from the judgment.

Mr. Abinash Chandra Ghose for the Appellants.

Mr. Biswanath Naskar for the Respondents.

C. A. V.

The following judgment was delivered :

July, 9.

The plaintiffs who are three in number instituted this suit for a declaration that they had a ¾ share in the property in suit and for possession thereof. Their case briefly is as follows :—C. S. Dags Nos. 4145 and 4152 of Khatian No. 439/2 of Mouza Baruipore belonged to Rajendra. Rajendra had four sons viz. Behari, (the father of pro-forma defendants Nos. 2 and 3) and the three plaintiffs. The property in suit together with other property was mortgaged to one Jodu Nath Pal. At a sale in execution of a decree passed in a suit upon this mortgage Rajendra purchased the property in suit in the *benami* of Joy Krishna Mondal. After Rajendra's death the three plaintiffs and the sons of Behari (the pro forma defendants Nos. 2 and 3) possessed the property jointly,

*Appeal from Appellate Decree No. 1283 of 1938, against the decree of Kumud Bandhu Sen Esq., Additional Subordinate Judge, 1st Court, of 24-Parganas, reversing the decree of Sailendra Prosad Ghose Esq., Munsif, 2nd Court, Baruipore, dated 11th June, 1937 and remanding the case.

(1) (1927) 31 C. W. N. 878.

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the plaintiffs having a ¾ share and the pro-forma defendants a ¼ share. The pro-forma defendants Nos. 2 and 3 wrongfully let out the entire land to the defendant No. 1 who got his name recorded as a tenant in respect of the entire land. The plaintiffs accordingly sued for a declaration that they were the owners of ¾ of the land and for possession of their share. In the alternative they prayed for rent at a fair and equitable rate.

The three defendants contested the suit. Their case is that at the auction sale the land was purchased not by Rajendra but by Behari in the *benami* of Joy Krishna and that the land belonged to the pro-forma defendants Nos. 2 and 3 who leased it out to the defendant No. 1. The defendant No. 1 contended further that the plaintiffs are estopped from evicting him as they allowed him to construct a brick house on the land and to excavate a tank. They also pleaded that the suit is barred by limitation.

The trial Court framed the following 3 issues:

"(1) Is the claim barred by estoppel?

(2) Can the plaintiffs get any relief without payment of any compensation? If not, what would be the amount of such compensation?

(3) Was any purchase effected by plaintiff's father Rajendra in the *benami* of Joy Krishna Mondal? Have they their alleged title to the disputed lands?"

The learned Munsif held that the purchase was made by Behari and not by Rajendra and in this view he dismissed the plaintiff's suit without deciding the other issues. Although he did not frame a specific issue on the ground of limitation he considered the point and held that the suit was not barred by limitation.

On appeal the learned Subordinate Judge took a different view and he has found that the purchase was made by Rajendra and not by Behari. He agreed with the Munsif that the suit was not barred by limitation and on these findings he has declared the plaintiff's title and remanded the case to the trial Court for the disposal of the other two issues.

The defendants appeal.

A preliminary objection is taken that no appeal lies inasmuch as this is not an order of remand under Order 41, rule 23 of the Code of Civil Procedure but an order of remand made either under Order 41, rule 25 or under section 151 of the Code of Civil Procedure. It is quite clear that no appeal lies from an order of remand made under Order 41, rule 25; nor does an appeal lie from an order of remand under section 151 of the Code of

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Civil Procedure unless such order amounts to a decree. In my opinion, however, this order of remand is substantially one under Order 41, rule 23 and is, therefore, appealable. The learned Munsif disposed of the entire suit on the sole ground that Behari and not Rajendra was the purchaser and he has not dealt with the other issues which were raised. The learned Subordinate Judge has reversed the decision of the Munsif on this point and he has sent the whole suit back for disposal on the other issues framed by the Munsif. The learned Judge has not kept the appeal pending on his file nor has he framed any issues and sent them back for disposal. The appeal has been disposed of. This is certainly not a remand expressly in terms of Order 41, rule 25 nor is it substantially an order of remand under that rule. It is, in my opinion, in substance a remand under Order 41, rule 23.

In the case of *Jagathari Saha* v. *Medini Mohan* (1), the various decisions on this point have been discussed and the view is expressed that "the law as it obtains at present appears to be that although the Court ordering the remand may have had no jurisdiction under rule 23 to pass the order under that rule, nevertheless if the order of remand as made purports to be an order under Order 41, rule 23 and appears to be in form and substance an order under that rule it is to be regarded as an order of remand passed under rule 23 and therefore subject to appeal." This is exactly the position in this case and I hold that this appeal is competent.

Various grounds have been urged on behalf of the appellants which I now propose to deal with. First it is said that reversal of the finding of the Munsif that Joy Krishna was the *banamdar* of Behari and not of Rajendra is not a proper reversal inasmuch as all the reasons of the Munsif have not been considered. I am not prepared to accept this contention. The learned Judge has considered substantially the reasons given by the learned Munsif and he has given his own reasons for the view that Rajendra and not Behari was the real purchaser. This is a finding of fact with which I am not prepared to interfere.

It was next contended that the learned Judge had misdirected himself when considering the settlement records. The Judge has said that the settlement record showed that the plaintiffs are the owners of the share claimed and he held that the presumption of correctness attaching thereto has not been rebutted. Learned Advocate for the appellants says that the settlement record was

(1) (1927) 31 C. W. N. 878.

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not marked as an exhibit and that the learned Judge should not have referred to it. I find that in the trial Court it was admitted by the defendants that the plaintiffs were recorded in Khatian No. 4391 as having the share claimed in the suit. This fact is mentioned by the learned Munsif in his judgment. In these circumstances the fact that the Khatian was not exhibited is of no importance. The learned Judge was justified in acting on this admission.

Another point argued was that at the time of the purchase Rajendra was an insolvent and therefore he could not legally acquire any property which he could transmit to his heirs. This question was not raised in either of the Courts below. It is true that there was evidence that Rajendra was the subject of insolvency proceedings at the time but this fact alone is not sufficient to establish that he could acquire no title to the land. The insolvency proceedings may have been dropped. Rajendra may have been discharged. Many things may have happened which would have enabled Rajendra to acquire title to the property in spite of the fact that at the time of the purchase he was the subject of insolvency proceedings. This is a mixed question of law and fact and cannot be entertained for the first time in second appeal.

Next it was argued that the suit it barred by limitation. Both courts have found that the plaintiffs were in possession within 12 years of the suit and I see no reason to disturb this finding. The complaint of the appellants is that the lower appellate court has not discussed this question sufficiently and has merely reproduced the reasons given by the trial court on the question. When an appellate court affirms the decision of the trial court there can be no objection if it adopts the language of the trial court. I hold that there was sufficient evidence before the court below to find that the suit is not barred by limitation.

Learned Advocate for the appellants drew my attention to the fact that the Courts below have found that one of the plaintiffs, Bankim, is a mendicant and he says that this is sufficient ground for dismissing Bankim's claim. There is no substance in this point. The finding is that Bankim generally lives the life of a mendicant. This could not disentitle him from owning property.

The last ground taken is of substance. The plaintiff Nityananda stated that he did not wish to prosecute the appeal yet the lower appellate Court has declared his title. Learned Advocate for

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the appellant argues that the decree of the trial Court so far as Nityananda is concerned should remain. In my opinion, this argument is sound. There is no reason why the dismissal of Nityananda's claim should be set aside. I accordingly vary the decree passed by the lower appellate court to this extent only that the claim of Nityananda is dismissed. The title of the other two plaintiffs to a ½ share in the land is declared. The rest of the decree passed by the lower appellate Court is upheld.

The plaintiffs Nos. 1 and 3 will get the costs of this appeal from the defendants.

A. T. M. *Decree varied.*

CIVIL REVISION.

Before Mr. Justice A. N. Sen.

SRIMATI UMASASHI DEVI

v.

SRIMATI RADHA BENODINI DEVI AND OTHERS.*

CIVIL.

1940.

May, 31. June, 17.

Pre-emption—Sale of occupancy holding by a co-sharer tenant to a stranger—Application by co-sharer for the transfer—Transfer effected before the passing of section 26F of the Bengal Tenancy Act (VIII of 1885 as amended by Bengal Act VI of 1938), Sec. 6.

The right of a co-sharer tenant for re-transfer of occupancy holding transferred to a stranger by another co-sharer arises within 4 months from the date of registration of the Kobala, under section 26F of the Bengal Tenancy Act, though the title of the transferee vested before the coming into force of the said section.

Applications for Revision under section 115 of the Code of Civil Procedure by the Petitioners.

* Civil Revision Cases Nos. 1603 and 1832 of 1939, against the order of H. G. S. Bivar. Esq., District Judge of Burdwan, dated the 10th June, 1939 and of A. F. M. Rahaman, Esq., District Judge of Dacca, dated the 25th August, 1939, respectively, affirming those of K. N. Bhattacharrya, Esq, Munsif, 3rd Court of Burdwan, and of N. C. Chatterjee, Esq., Munsif of Munshiganj (Dacca), dated the 26th June, 1939.

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1940.

Sm. Umasashi Devi v. Sm. Radha Benodini Devi.

The material facts appear from the judgment.

Messrs Jatindra Mohan Chaudhuri and *Smriti Kumar Rai Chaudhuri (for Ramani Mohan Banerjee)* for the Petitioners in 1603.

Messrs. Chandra Sekhar Sen and *Manindra Nath Ghose* for the Opposite Party.

Mr. Nripendra Nath Dutt Ray for the Petitioner in 1832.

Mr. Khon ar Mahomed Hasan for the Opposite Party.

C. A. V.

The following judgment was delivered:

June, 17.

These two Rules raise a common question for determination. They have been heard together and this order will govern both the Rules.

I shall take up for consideration Rule No. 1603 of 1939. The petitioner is a co-sharer in an occupancy holding. Her co-sharers sold their share to the opposite party No. 1 who is a stranger by two Kobalas, dated 14th June, 1938.

On 31st August, 1938 the Kobalas were presented for registration and registered.

On 23rd January 1939 the petitioner applied under section 26F of the Bengal Tenancy Act that the share sold to the opposite party No. 1 be transferred to her. The learned Munsiff refused the application. The petitioner appealed to the District Judge who upheld the decision of the Munsiff. Hence this application in revision.

The ground on which the application of the petitioner was refused is this. On the date of the execution of the Kobalas the present section 26F of the Bengal Tenancy Act was not in force. Under the old section a co-sharer tenant had no right to claim a re-transfer of a share of the tenancy sold to a stranger. This right was in the immediate landlord of the transferor. The present section 26F which confers the right on a co-sharer tenant to claim a transfer to him of the share of a tenancy sold to a stranger by another co-sharer came into force on 18th August, 1938 after the execution of Kobalas. The fact that the Kobalas were registered on 31st August, 1938 after the new section came into force does not, according to the view of the lower appellate Court, help the petitioner inasmuch as section 47 of the Indian Registration Act says that a registered document shall take effect from the date of xecution and not from the date of registration. The lower Court held that the title to the transferred property had vested in the

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transferee on the date of the execution of the Kobalas and that the petitioner could not claim to divest him of such title by relying on a right which was not then in existence and which had come into existence by an amendment of the law effected after such right had vested.

The petitioner contended that this view is erroneous. The argument of the learned Advocate on her behalf is that the transfer did not become effective till the date on which the Kobalas were registered; on that date section 26F was in force and the petitioner having applied within the time prescribed by section 26F there was no bar in her way of getting a re-transfer.

This is a case of first impression and it must be decided with reference only to the words of section 26F without the assistance of any judicial interpretation of the section. There is no doubt that the sale to the opposite party No. 1 takes effect from 14th June 1938 (the date of execution) and not from the date of registration. Section 47 of the Indian Registration Act is quite clear on this. It says "A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration." The words used are 'shall operate' not 'shall be deemed to operate.' Therefore I hold that the transfer in favour of opposite party No. 1 operates from the 14th June 1938, i.e. from before the amended section 26F came into force. The next question is whether in this event the petitioner can get a re-transfer under section 26F of the Bengal Tenancy Act. Now what are the words of this section? The relevant words are this† :—"Any one or more co-sharer tenants of the holding, a portion or share of which is transferred, may within four months of the service of the notice under section 26C, apply to the Court for the said portion or share to be transferred to himself or themselves." The section then goes on to say that if the application is in time and if certain deposits are made and other acts are performed the Court *shall make* an order allowing the application [26F(5)]. It further provides* that from the date of making the order "the right, title and interest in the portion or share of the holding, accruing to the transferee from the transfer shall...............be deemed to have vested,............in the co-sharer tenants." The notice to be served under section 26(C) is the notice which has to be supplied to the Registering Officer by the transferor for service on the co-sharer tenants under section 26C(4) of the Bengal Tenancy Act.

To say that section 26F of the Bengal Tenancy Act conferred

† See Cl. (e) of Sec. 26F of 1938—Rep. * See 26F (7) of 1931—Rep.

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a right of preemption upon a co-sharer from the date when the section came into force and to argue from this that the conferment of such a right cannot have retrospective effect and cannot divest persons of rights which had already accrued is neither an accurate statement of the purport of section 26F nor a sound argument of its effect on vested rights.

It must be remembered that section 26C. was put into force at the same time as section 26F. Section 26C imposed certain duties upon the co-sharer tenant who had transferred his share in the tenancy. It laid down that the transferor must file notices with the Registering Officer and process fees so that the notices may be served on his co-sharers and it said that unless this was done the transfer would not be registered.

Section 26 (F) gave the petitioner the right to apply after receipt of this notice for a re-transfer of the share sold to him provided he applied within 4 months of the notice.

The duties imposed upon the transferor by section 26 C and the rights conferred upon the co-sharers by section 26 F came into effect on 18th August, 1938. On that date section 26 F in clearest terms gave one co-sharer the right to make an application to divest a stranger transferee of his title acquired by purchase from another co-sharer. It directed in clear terms that the application should be made after receipt of the notice of registration and not before. The right to make the application would arise upon receipt of this notice. Before that the co-sharer was not required to do anything nor could he do anything. The section provided that if such an application is made and certain requisites were performed the Court was bound to order a re-transfer. The section did not say anything abcut the date of execution of the deed of transfer. What has to be ascertained is whether all the conditions mentioned in section 26 F have been satisfied in this case. In my opinion they have been satisfied. On the date on which the application was made a part of the holding had been transferred by a co-sharer to a stranger, the transfer was registered after the new section 26 (C) came into force, a notice under section 26(C) was served on the petitioner and the application was made within 4 months of the receipt of the notice. The other requisites provided in section 26F have admittedly been satisfied. There remained, in my opinion, no alternative in the Court but to perform its duties under the section and direct a re-transfer to the petitioner. The question whether the section has retrospective effect does not really arise. It is not necessary

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for the petitioner to claim that the section has restrospective effect. She claims that on 18th August, 1938, she was given the right to apply for a re-transfer to her of the share of the tenancy sold to the opposite party No. 1 and she asserts that there are no reasons why she should be deprived of the right which the section expressly grants to her. I consider that there can be no answer to this claim. The provisious contained in section 47 of the Indian Registration Act whereby a transfer is made to relate back to the date of the execution of the document does not really touch the question which has to be decided. I agree that the transfer to the opposite party must be taken to have been made on 14th June, 1938. I agree that the right to the property vested in the opposite party on that date but this will not affect the right expressly given to the petitioner by section 26F of the Bengal Tenancy Act to get the property transferred to her by making an application to this effect within 4 months of the date of the receipt of the notice of registration of the deed.

In this view the order passed by the learned Court below must be set aside and the application for transfer must be allowed. The Rule is made absolute with costs. Hearing-fee 1 gold mohur.

This decision will also affect Rule No. 1832 of 1939. The point involved there is exactly the same. That Rule is also made absolute with costs. Hearing-fee 1 gold mohur.

A. T. M. *Rules made absolute.*

APPELLATE CIVIL.

Before Mr. Justice R. C. Mitter and Mr. Justice A. S. M. Akram.

SUDHANYA MOHAN BASAK AND OTHERS

v.

MONORAMA GUPTA AND OTHERS.*

CIVIL.

1940.

July, 17, 18, 23.

Loan—Bengal Money Lenders Act (VII of 1933), Section 4—Principal of the loan in the case of renewed bond.

The 'principal of the loan' in section 4 of the Bengal Money Lenders Act 1933, is the amount actually advanced or parted with by the money-lender, the original loan and not what is stated as the principal in the renewed bond, which is made up of original loan or balance thereof and the arrears of interest capitalised.

* Appeal from Original Decree No. 191 of 1936, against the decree of Rajendra Lal Chakravarty, Subordinate Judge, 4th Court, Dacca, dated 9th May, 1936.

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1940.

Sudhanya Mohan Basak v. Monorama Gupta.

Appeal by the Plaintiffs.

Suit for money.

The material facts appear from the judgment.

Messrs. Jitendra Kumar Sen Gupta and *Haridas Gupta* for the Appellants.

Messrs. Surajit Chandra Lahiri and *Smriti Kumar Rai Choudhury* for the Respondents.

Mr, Pannalal Chatterji for the Deputy Registrar.

C. A. V.

The following judgment was delivered :

July, 23.

The plaintiffs appellants instituted a suit against the original defendant Monorama Gupta to recover moneys due to them on two mortgages. In this appeal we are concerned with one of the said two mortgages namely Ex. 4, dated the 19th April, 1916. The claim of the plaintiffs on this mortgage, as laid in the plaint is Rs. 3,995 for principal and Rs. 2,505 for interest up to date of the suit, after relinquishment of their claim to interest to the extent of about Rs. 1,500, total Rs. 6,500.

On the 19th June, 1903 the defendant borrowed Rs. 2,000 from Sarat Chandra Basak, the father of the plaintiffs, and to secure the said loan executed a mortgage, Ex. 1 on that date. Interest stipulated was simple interest at the rate Rs. 9-12 per cent per annum. Some interest due under it was paid. On the 19th April, 1916 there was an adjustment of accounts and a sum of Rs. 1,995 was found due on account of interest. On that date the mortgage bond in suit, Ex. 4 was ex cuted by the defendant in favour of the plaintiffs, their father Sarat Chandra Basak having died some time before. The mortgage bond recited the fact that the defendant had borrowed Rs. 2,000 from Sarat Chandra Basak on the 4th Assar, 1310 (19th June, 1903) on a mortgage (Ex. 1) and that the sum of Rs. 1,995 was then due for interest on the said loan of Rs. 2,000. The interest then due was capitalised and the mortgage Ext. 4 was executed. The rate of interest provided for was the same as in Ex. 1. The properties included in Ex. 1 were charged and some more properties were given by the mortgagor as additional security. Some payments were made towards interest before suit, but the aforesaid sum of Rs. 2,505 remained due (after relinquishment of about Rs. 1,500 for interest) on account of interest at the date of the suit calculated on the basis that the principal was, as stated in Ex. 4, Rs. 3,995. The defence which is material to the appeal, was that the plaintiffs cannot

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recover more than Rs. 4,000 on the basis that Rs. 2,000, and not Rs. 3,995, is to be considered to be "the principal of the loan" within the meaning of section 4 of the Bengal Money Lenders Act (VII of 1933). This defence has been given effect to by the learned Subordinate Judge who has passed a decree in favour of the plaintiffs for Rs. 4,000 only. The plaintiffs have filed this appeal. They admit that section 4 of the Bengal Money Lenders Act—VII of 1933—applies but contend *firstly*, that the "principal of the loan" must be taken to be what has been stated to be and treated as principal in Ex. 4, the bond sued upon, namely Rs. 3,995 and not Rs. 2,000 the actual advance, and *secondly*, that even if Rs. 2,000 the actual advance, be treated as "the principal of the loan" under section 4 of the said Act the amount of interest recoverable in the suit was to be limited to Rs 2,000 which, however, must be added to Rs. 3,995, the amount at which their dues were settled on the 19th April, 1916 when Ex. 4 was executed. According to their first contention they would have been entitled but for the relinquishment of a portion of their claim for interest to a decree for Rs. 3,995 (principal) + Rs. 3,995 (interest) = Rs. 7,990; and according to their second contention they would be entitled to a decree for Rs. 3,995 (principal) + Rs. 2,000 (interest) = Rs. 5,995. We cannot accept any of these contentions and are of opinion that the decree passed by the learned Subordinate Judge is right. The questions raised depend upon the interpretation of section 4 of the said Act.

The language employed by the legislature is that a money-lender cannot recover by suit as interest an amount greater than "the principal of the loan, subject to an exception which is not material in this appeal. In terms the section or the Act does not deal with recovery of the principal of the loan. But the intention of the legislature is clear. The money-lender cannot recover more than twice the amount of the principal of the loan, where his claim according to the contract exceeds the same, namely "the principal of the loan" *plus* an amount for arrears of interest not exceeding that "principal of the loan." For making the decree the principal of the loan must be taken to represent the *same sum*, not *one sum* for considering the claim for interest and for limiting it under section 4 and *another sum* for considering the claim for principal. We cannot therefore accept the second contention of the appellants. They can get a decree limited to Rs. 4000 if "the principal of the loan" is to be taken as Rs. 2,000, the sum that was actually advanced, or limited to Rs. 7990 (leaving out of consideration for

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the present the amount of interest they have relinquished) if the principal of the loan is to be taken to be what is mentioned in the bond in suit, Exhibit 4, namely Rs. 3995. The real question therefore is what is "the principal of the loan"—the phrase used in section 4—in the case of a renewed bond. The question, so far as we are aware, has not been discussed in detail in any case in this Court. In an unreported decision of Mukherjea, J.,* in which the learned Chief Justice concurred, it was held definitely that "the principal of the loan" is the amount *actually* advanced, although in that judgment the reasons for the said conclusion are not specifically stated.

The words "principal of the loan" or the word "principal" have not been defined in the Act (VII of 1933). Apart from any other considerations in the case of a renewed bond it may mean the money actually advanced—the original loan—or the capitalised sum, the amount of the original loan added to the arrears of interest by agreement between the creditor and the debtor. The learned Advocate for the appellants contends for the second meaning. His contention is firstly, that for the purposes of section 4 the principal of the loan must be taken to be what has been agreed upon between the creditors and debtor to be the principal for the purpose of producing or yielding interest or income in future. He says that if that position is not accepted what had been settled by the parties would be unsettled. He accordingly says that as the sum of Rs. 3995 was to yield interest or income—the interest at the rate 9¾ per cent. was to be calculated according to contract on the sum of Rs. 3995 and not on Rs. 2,000 the original sum lent, from after Exhibit 4—that sum of Rs. 3995 is to be regarded as the principal of the loan for the purposes of section 4 of the Act. His second contention is that section 4 in substance gives statutory force to the Hindu Law of Damdupat and makes it applicable to the whole province of Bengal. In cases where the Hindu Law of Damdupat was applied the capitalised amount in the renewed bond and not the amount originally lent has been taken to be the principal. In support of this last mentioned proposition he relies upon the decision of Jenkins, C. J. and Candy, J. in *Sukalal v. Bapu Sakharam* (1)

When analysed his first argument rests on the foundation that the sanctity of contract between parties must be respected by Courts. That is no doubt a good principal on which the Courts

*Appeal from Original Decree No. 82 of 1936 decided on the 29th June, 1938.—Unreported.

(1) (1899) I. L. R. 24 Bom. 305.

proceed normally, but that principal cannot be availed of in construing the Bengal Money Lenders Act or any other Act of the like kind. The object of that Act is to give relief to debtors by relieving them partially of the effect of their contracts. It cannot therefore be held that "the principal of the loan" is the amount which the creditor and debtor had agreed to call as principal, what was to be treated by agreement to be the principal for the purpose of producing future income or interest to the creditor.

The second contention of Mr. Sen Gupta is that section 4, subject to the exception provided therein, embodies what is known as the rule of Damdupat, that in any event we should construe the words "principal of the loan" occurring in the section in the same way as the word principal has been construed in reference to the rule of Damdupat and the decision in *Sukalal's* case (1) is relied in support. We cannot hold that the legislature has merely adopted the Hindu Law of Damdupat. There is no such indication in the Act itself. We will have to construe section 4 by giving effect to every word. Its provisions are not ambiguous and we cannot add any word or cut out any. The subject of the Act will, however, have to be taken into consideration. *Sukalal's* case (1) cannot in our judgment furnish an analogy, for Jenkins, C. J. made it quite clear from the questions he made from the Smritis and Commentaries of the Hindu jurists that those jurists considered as principal for the purpose of the rule of Damdupat, the capitalised amount, the amount of the principal *plus* the accrued interest, in which was stated by agreement to be principal in the renewed bond.

In the Oxford Dictionary the word "principal" in reference to a loan is defined as what constitutes "the *primary* or *original sum*, that is the *main* capital sum invested or lent and yielding interest or income." The word "loan" is defined as "something the use of which is allowed for a time on the understanding that it shall be returned or an equivalent given, especially a sum lent on these conditions and usually at interest" and the word "lend" thus: "to grant the temporary *possessions* of a thing on conditions or in expectation of the return of the same or its equivalent." In view of these definitions the phrase "the principal of the loan" according to its dictionary meaning in the case of a money transaction is the sum of money which the creditor parts with, which he puts into the *possession* of the debtor. The phrase must accordingly mean the sum *actually* advanced, and not the sum actually advanced *plus* what is not *actually* advanced—the possession of which is not parted

(1) (1899) I. L. R. 24 Bom. 305.

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by the creditor, namely the capitalised interest. This is the definition which is given in the other sister Act e. g. the English Money Lenders Act (17 and 18 George V, Chapter 21, section 15) and would follow from the definition of interest contained in section 2 of the Usurious Loans Act (X of 1918 I. C.). The acceptance of the definition of that phrase as contended for by the appellants would enable a money-lender to defeat the object of the Bengal Money Lenders Act and the provisions of section 4 would have no controlling effect. A money lender is usually in an advantageous position so far as his debtor is concerned and all that he need do in that case, is to take successive renewals from his debtors by capitalising interest in arrears. We accordingly hold that the phrase " principal of the loan " in secton 4 means the amount *actually advanced* or *parted with* by the money lender, the original loan and not what is stated as the principal in the renewed bond and which is made up of the original loan or balance thereof *and* the arrears of interest capitalised. We accordingly hold that the learned Subordinate Judge is right and this appeal must be dismissed with costs, hearing fee being assessed at 3 gold mohurs.

A. T. M. *Appeal dismissed.*

Before Mr. Justice R. C. Mitter and Mr. Justice A. S. M. Akram.

CIVIL.
1939.
August, 16, 21,

MR. K. K. DAS, RECEIVER, SUBSTITUTED IN THE PLACE OF RADHA BALLAV SAHA AND ANOTHER

v.

SRIMATI AMINA KHATUN BIBI AND ANOTHER.*

Ownership—Building erected by husband—Knowledge of husband.

If a husband builds a house on his wife's land knowing it to be hers, in the absence of special circumstances, the land and building belong to wife.

Ramsden v. *Dyson* (1) applied.

Appeal by the Defendants.

*Appeal from Original Decree No. 57 of 1936, against the decree of Babu Bhuban Mohan Singh, Subordinate Judge, of 3rd Court, Hooghly, dated the 12th December, 1935.

(1) (1866) L. R. 1 H. L. 129.

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1939.

Mr. K. K. Das, Receiver v. Sm Amina Khatun Bibi.

Suit for declaration.

The material facts appear from the judgment.

Messrs. Nagendra Nath Ghose and *A. Quasem (Sr)* for the Appellants.

Messrs. Panchanan Ghose and *Khondkar Mohammad Hasan* for the Respondents.

C. A. V.

The following judgment was delivered :

August, 21.

Kazi Abdul Aziz (defendant No. 3) borrowed sums of money from Radha Ballav Saha (defendant No. 1) on different occasions from the 24th April to the 17th October, 1928. The said defendant No. 1 brought a suit in 1931 to recover the same and got a decree for Rs. 3129 odd on the 6th May, 1932.

Kazi Abdul Aziz had a running business with Shaikh Muhamed Hanif (defendant No. 2). The accounts were twice adjusted, once on the 13th April, 1931, when Rs. 1907 odd was found due from the former to the latter, and again on the 17th October, 1931, when a sum of Rs. 2304 odd was similarly found due. For both these amounts Abdul Aziz executed *hatchittas* in favour of Muhamed Hanif. Transactions between them, however, continued till the 5th April, 1932. On that date the former was in debt to the latter to the extent of Rs. 2076 odd. The latter brought a suit and recovered a decree for the same on the 10th March, 1933. These two decree-holders executed their decrees and attached some properties as belonging to their judgment-debtor. The plaintiff appellant, who is the wife of Abdul Aziz, preferred two claims. These claims were dismissed by the executing Court on the 31st August and 4th October, 1933, respectively. She then instituted this suit under the provisions of Order 21, rule 63 of the Civil Procedure Code on the 8th November, 1933. In the suit she claims the properties described in three Schedules A (1) B (1) and C (1) as her own. On some of the plots included in Schedule A (1) stands a pucca dwelling house. She also claims the same on the ground that she constructed it with her own money after the lands had been conveyed to her in 1909 by her husband in consideration of the dower money then due to her.

The learned Subordinate Judge by his judgment and decree dated the 12th December, 1935, allowed her claim to the lands described in Schedule A (1) and to the structures thereon, but has dismissed her suit in respect to the properties described in Schedules B (1) and C (1). This appeal is confind to the lands

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Mr. K. K. Das, Receiver v. Sm. Amina Khatun Bibi.

of Schedule A (1) and to the structures thereon. We are told that an appeal has been filed by her against that part of the decree of the Subordinate Judge which is against her. Nothing which we may hereafter say shall be taken to prejudice any of the parties in respect of the properties of Schedules B (1) and C (1).

Defendants Nos. 1 and 2 have preferred this appeal in which they challenge the findings and conclusions of the learned Subordinate Judge in respect of the lands of Schedule A (1) and the buildings thereon.

With regard to the lands of the said schedule we hold that the learned Subordinate Judge is right in his conclusions. The said lands had been conveyed to the respondent by her husband by a registered Kobala dated the 25th May, 1909 (Ex. 1). The consideration recited is the liquidation of half the dower debt then due to her. The evidence is one-sided that a dower of Rs. 1102 was fixed at the time of the marriage. There is no evidence that that debt had been discharged by the husband before May, 1909 in any other way. There is also no evidence that the husband was involved in 1909. There is no reason why he should execute a fictitious deed as far back as 1909. We accordingly hold in agreement with the learned Subordinate Judge that Ex. 1 is a valid document and had passed to the respondent the lands described in Schedule A (1) of the plaint.

Some of the plots mentioned in Schedule A (1) constitute the homestead of the couple. The evidence is that at the time of Exhibit 1 there were Kutcha structures thereon. Thereafter valuable structures costing about Rs. 4000 have replaced those Kutcha buildings. The respondent's case is that with her own money she built these structures in or about 1923. She and her witness Abdul Barik Mallik have said that these structures had been built with the sum of Rs. 2000 which had been given to her by her father, with Rs. 1500 being the sale proceeds of her ornaments and with Rs. 500 being the accumulated profits of her property. The learned Subordinate Judge has believed this story but we cannot. There is overwhelming documentary evidence that the pucca structures were built not in 1923, but the building operations commenced in 1927 at the earliest. The tradespeople who supplied the materials have been examined by the contesting defendants. They have proved that materials were supplied on credit to defendant No. 3 from 1927 to 1932. The account books produced by them (Ex. A to Ex. D series) corroborate their oral testimony. The evidence in support of the respondent's case

that she got Rs. 2000 from her father and Rs. 1500 from sale of ornaments is of a flimsy character. Nor is there any corroborative documentary evidence to support the case that Rs. 500 had been saved from her income and applied to the building. On the evidence we hold that the building had been raised by the defendant No. 3 with his money. The suggestion of the appellants is that the money borrowed by defendant No. 3 was utilized by him in the building. This suggestion cannot be true in respect of the advances made by appellant No. 2. The debts of defendant No. 3 to him were trade debts [See defendant No. 2's plaint Ex. O (1)—II—132]. There may be something in the suggestion of appellant No. 1, but that suggestion rests on no evidence. It is at least clear on the facts that defendant No. 3 had tapped other resources also for completing the building. The loans given by the appellant No. 1 to defendant No. 3 were in 1928 (Ex. O—II—117) but the documentary evidence establishes the fact that money was spent upto 1932 in completing the building. The conclusion we arrive at is that the building was raised by funds supplied not by the respondent but by her husband, defendant No. 3, though we cannot precisely trace the ultimate source.

We have now to consider the legal position. The land belonged to the respondent but the building was erected at the costs of defendant No. 3 who knew at the time that the land was not his but wife's. Defendant No. 3 therefore does not come within the third proposition laid down in *Thakoor Chunder Poramanick* v. *Ramdhone Bhattacharjee* (1), a proposition which has been approved by the Judicial Committee of the Privy Council in *Vallabhdas Naranji* v. *Development Officer, Bandra* (2). He, the defendant No. 3, could not have claimed compensation from respondent as there was no equity in his favour. He spent money on the structures knowing that the land was not his. The question is whether he has the right to remove the structures. If he has that right, that right must have for its basis his ownership in the structures. If he had spent in the bona fide belief that he was the owner of the land or had the right to build he could have claimed compensation or the right to remove the structures. That is what has been laid down all along since *Thakoor Chunder's* case (1), and the principle entitling a person to compensation has now been given statutory recognition in the case of transferees

(1) (1866) 6 W. R. 228 F. B.; B. L. R. Sup. Vol. 595.
(2) (1929) L. R. 56 I. A. 259; 45 C. L. J. 497.

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(section 51 of the Transfer of Property Act). In the said case (*Thakoor Chunder's* (1)) three propositions are laid down:

(1) building and other such improvements do not by the *mere accident* of their attachment to the soil become the property of the owner of the soil;

(2) if he who constructs the building or makes the improvement on another's land is a mere trespasser he cannot claim compensation from the owner of the soil nor has he the right to remove them;

(3) if, however, he was in possession of the land under a bona fide title or claim of title he can either remove them or obtain compensation for the value of the building or improvement if it is allowed to remain for the benefit of the owner of the soil, the option of retaining the building etc. or of allowing removal remaining with the latter.

In *Vallabhdas Naranji's* case (2) the first and third propositions were approved but opinion was reserved by the Judicial Committee on the second proposition. The Indian decisions, however, lay down the proposition that in the case of wanton trespass the trespasser has no right to claim either compensation or the right to remove the materials. In the case before us in view of the relationship between defendant No. 3 and the respondent we cannot say that defendant No. 3 was a trespasser on the land within the meaning of the proposition so laid down in the cases. The decision in *Thakoor Chunder's* case (1) is that the building does not become the property of the owner of the soil by the *mere accident* of attachment. This proposition lends support to the view that if there be something more, the building would become the property of the owner of the soil. The fact that the husband constructed the building on his wife's land knowing it to be his wife's, is in our judgment such an additional and special circumstance which takes the case out of the first general proposition laid down by that Full Bench. The husband never intends in such a case to reserve any right in the structures. He intends to make the habitation, both of himself and of his wife, more comfortable.

In *Ramsden* v. *Dyson* (3), a case between landlord and tenant, Lord Cranworth L. C. laid down a principle which, can be dissected into two broad propositions and from those two proposi-

(1) (1866) 6 W. R. 228 F. B; B. L. R. Sup. Vol. 595.
(2) (1929) L. R. 56 I. A. 259; 45 C. L. J. 497.
(3) (1866) L. R. 1 H. L. 129.

tions he deduced a third proposition. The first two propositions are

(i) if a stranger builds supposing the land to be his own and the real owner perceiving the mistake of the former knows at the time of the expenditure that the land belongs to him and stands by, the Court of equity will not allow the latter to insist on his legal title,

(ii) if, however, the stranger builds upon the land of another knowing it to be the latter's, there is no principle of equity which will prevent the latter from claiming his land *with the benefit of all the expenditure made on it.*

The third proposition deduced is that if a tenant so builds, in the absence of special circumstances, the land and the building belong to the lessor. This last-mentioned proposition must be taken subject to the provisions of section 108 (h) of the Transfer of Property Act.

The principle laid down in *Ramsden* v. *Dyson* (1) was applied by the Judicial Committee in a case from India [*Lala Beni Ram* v. *Kundan Lall* (2)]. In our judgment that decision lends authority to the view that the principle formulated in the second proposition in *Ramsden's* case (1) is a principle applicable to Indian cases. This view of ours receives support from the observation of Rampini and Mookerjee JJ. in *Dharma Das Kundu* v. *Aumlyadhan Kundu* (3) and of Darwood & Mya Bin JJ. in *Maung Aung Ba* v. *Ma Nyum* (4). We accordingly hold that the building also belongs to the respondent.

The appeal is accordingly dismissed with costs,—hearing fee three gold mohurs.

A. T. M. *Appeal dismissed.*

(1) (1866) L. R. 1 H. L. 129.
(2) (1899) L. R. 26 I. A. 58 ; I. L. R. 21 All. 496.
(3) (1906) I. L. R. 33 Calc. 1119 (1129) ; 3 C. L. J. 616 (623).
(4) [1928] A. I. R. Rangoon. 141 (142 & 143).

Before Mr. Justice R. C. Mitter and Mr. Justice A. S. M. Latifur Rahman.

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March, 14, 15, 16, 17.

SYED UDDIN AHAMMED AND OTHERS

v.

MAHARANI HEMANTA KUMARI DEVI AND OTHERS.*

Presumption—Record-of-rights—Raiyat—Bengal Tenancy Act (VIII of 1885), section 5—Burden of proof—Chur land—Reclamation lease.

Where there was a reclamation lease for more than 100 Bighas in area, though the record-of-rights recorded the tenant as a raiyat, the rights of parties must be determined by reference to the terms. The presumption afforded by the record-of-rights is of little importance.

The onus is on him who claims to be a raiyat to rebut the presumption arising under section 5 of the Bengal Tenancy Act.

Debendra Nath Das v. Bibudhendra Bhramarbar Roy (1) referred to.

The presumption can be rebutted by from the lease itself, if it be of an unambiguous character and if of ambiguous character, the surrounding circumstances must be looked at.

Appeal by Defendants Nos. 1 to 22, and 27 and Cross-objection by Plaintiffs against Defendant No. 23.

Suit for possession or alternatively for determination of fair and equitable rent.

Messrs. Hamidul Huq and *Obaidul Huq* for the Appellants.

Messrs. Bansari Lal Sarcar and *Dinesh Chandra Roy* for the Respondents.

Mr. Pannalal Chatterjee for the Deputy Registrar.

C. A. V.

The following judgment was delivered:

March, 17. This appeal is on behalf of defendants Nos. 1 to 22 series and defendant No. 27 series, and is directed against a judgment and decree of the learned Subordinate Judge of Pabna, dated the 7th March, 1936.

The learned Subordinate Judge has fixed the annual rent of the tenure in question at Rs. 817-2 annas. He has further said that if defendants Nos. 1 to 22 series by a petition filed within two months of his judgment, accept the same rent they will remain on the land,

* Appeal from Original Decree No. 137 of 1936 with Cross-objection, against the decree of Tarini Kanta Nag Esq., Subordinate Judge, 1st Court, Pabna, dated the 7th March, 1936.

(1) (1918) L. R. 45 I. A. 67; I. L. R. 45 Calc. 805; 27 C. L. J. 543.

and in that event the plaintiff will be entitled to get rent at that rate together with cesses for the years 1338 to 1341 B.S. If, however, they refuse to accept the rent settled by the Court below, the said defendants will have to go out of the land, and in that event, the plaintiff will be entitled to *khas* possession by ejecting the said defendants and to get mesne profits per year at the rate of Rs. 817-2 for three years before the institution of the suit till the plaintiff recovers possession. It is against this decree that the defendants Nos. 1 to 22 series and defendant No. 27 have preferred this appeal.

Inasmuch as the learned Subordinate Judge refused to make a conditional order of ejectment against defendant No. 23, the plaintiff has filed a memorandum of cross-objection directed against that part of the decree and against defendant No. 23 only. As the said defendant is not one of the appellants but is respondent No. 2 in the appeal, we do not think that the memorandum of cross-objection is maintainable, for it is really a memorandum of cross-objection filed by one respondent against the another. The memorandum of cross-objection is accordingly a misconceived one and is dismissed but without costs.

To follow the points raised in the appeal, it is necessary to state the plaintiff's case as also the relief she has claimed in her plaint. The plaintiff is admittedly a zemindar of certain *char* lands, the area of which has been stated by her to be 399 bighas odd in Mouza Char Udaipur. This Char had formed in part in 1320 B.S. and at that time it was in the course of formation. In that year most the lands were covered with jungle or sand. The plaintiff intended to have the said Char reclaimed and brought under cultivation. With that object she notified her intention to settle the same. Two persons Munshi Mahomed Asiruddin Mondal and Kazimuddin Biswas offered to take settlement from her of the said Char which by guess was stated to be 392 Bighas. The plaintiff concluded a settlement with the said two persons for a term of ten years beginning from Agrahayan, 1320 B.S. to Kartic 1330. Asiruddin and Kazimuddin executed in her favour a registered Kabuliat on the 4th Agrahayan, 1320. In the Kabuliat they stipulated to pay Rs. 122-8 annas per year as rent for the said term. We will have to examine the terms of this Kabuliat Exhibit 4(a) later on. But at this stage we may say that there was a renewal clause in it which is as follows :—"If on the termination of the term we apply for taking a settlement of the aforesaid lands at a reasonable and proper rate, you will make a fresh settlement of the said Char with

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us, our heirs or representatives. Yourself and ourselves, with our heirs and representatives shall remain bound by all the stipulations in this Kabuliat."

About a year or so before the expiry of the original term Asiruddin and Kazimuddin defaulted in the payment of rent with the result that the plaintiff instituted a suit for recovery of rent against them, obtained a decree and put up the tenure to sale. At the sale defendant No. 1 who is the son of Asiruddin purchased the same. The plaintiff states in her plaint, that after the expiry of the term in the Kabuliat defendants No. 1 did not notify his intention to exercise the option of renewal for another term at a reasonable and proper rate of rent. The plaintiff accordingly, notified her intention to settle the land by public auction. A public auction was held and some persons made offers and the plaintiff settled the Char lands with those persons but the latter was obstructed by the sub-tenants of defendant No. 1. Those sub-tenants were one Sefatulla who is defendant No. 23 in the suit, and other persons who are defendants Nos. 24 to 53 of this suit, they being sub-tenants under defendant No. 23 Sefatulla who was the sub-tenant under Asiruddin and Kazimuddin and later on a sub-tenant under defendant No. 1.

The plaintiff further states in paragraph 2 of her plaint that in order to give the new settlement holders possession she instituted a Title Suit No. 80 of 1927 against defendants Nos. 23 to 53 of the present suit. That suit was decreed by the trial Count ex parte, but later on the ex parte decree was set aside and ultimately on contest her suit was dismissed by the High Court. She further states that the High Court dismissed the suit on the ground that she the plaintiff, was not entitled to *khas* possession at that time because the rights of Asiruddin and Kazimuddin, or their successor in interest defendant No. 1 had not been terminated because the plaintiff did not give them notice intimating the rent at which she was prepared to conclude a further settlement with them in terms of the renewal clause contained in Exhibit 4(a) which we have already recited. The judgment of the High Court is an Exhibit in this case. It is printed at page 16 of Part II of the Paper-book. That judgment is also reported in 37 C. W. N. 9. After the judgment, which was delivered on the 22nd July, 1932, she sent through registered post notices upon the principal defendants including defendant No. 1 (defendants Nos. 1 to 22) requiring them to take a further settlement from her on certain rates of rents which according to her were reasonable. Her case is that after the rent sale defendant No. 1 was alone her tenant,

Defendant No. 1 refused to receive the notice with the result that the registered letter addressed to him was returned. By his conduct defendant No. 1 made it quite clear that he was not prepared to take a resettlement from the plaintiff on reasonable rent in accordance with the option of renewal contained in Exhibit 4(a). She accordingly says that she became entitled to get *khas* possession from 20th April, 1934 when the notice by registered post addressed to defendant No. 1 was refused by him.

This is the statement made in paragraph 3 of the plaint and on this statement she bases her first two prayers in the plaint, namely, prayers (*ka*) and (*kha*). By prayer (*ka*) she prays for khas possession of the Char lands, her case being that on the determination in the aforesaid manner of the right of the defendant No. 1 to take a resettlement the rights of the under-tenants on the land of several degrees who were holding under defendant No. 1 had also ceased. The prayer (*kha*) is for mesne profits assessed tentatively at Rs. 3000 for a period of three years from before the date of the suit up to the date of the institution of the suit. In this prayer, she has also prayed for mesne profits during the pendency of the suit and till she recovers *khas* possession. The prayer (*ga*) is the prayer which she has made on her alternative case which we will now notice. In her notices asking the defendants to take a further settlement from her, the plaintiff mentioned Rs. 2 per Bigha for the *Abadi* land, Rs. 2-8 for Palan land, and Rs. 5 for Bastu land, as reasonable rates of rent at that time. In her plaint she states that if the Court determines that she is not entitled to *khas* possession and that the rates of rent proposed in her notices are not considered fair and reasonable, then in that case the Court should assess what is fair and equitable rent, and in that event she may be given a decree for arrears of rent for the years 1338 B. S. to 1341 B. S. against defendant No. 1 at the rate so assessed by the Court. This is her alternative case made in prayer (*ga*). Prayer (*gha*) is for interest and cost and for such other and further relief as the Court may deem fit to grant her.

It is not necessary to go into the details of the written statements. One written statement was filed by defendants Nos. 14, 15, and 17 to 21, another by defendant No. 23, the third by the 1st set of pro forma defendants, and the fourth by defendants Nos. 1 to 12. Defendants Nos. 1 to 12 as also defendants Nos. 14, 15 and 17 to 21 maintain in their written statements, the position that defendant No. 1 was really a *benamdar* for them (defendants

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Nos. 1 to 21) and for Asiruddin his father. The purchase by him at the rent sale was for the benefit of the said defendants and Asiruddin. They also maintain in their written statements that the plaintiff is not entitled to *khas* possession at all, and that the rent which the plaintiff demanded was absurdly high. They say that they are tenants under the plaintiff, and that they are prepared to accept a settlement on a reasonable rent which may be determined by the Court. Defendant No. 23 supports the other defendants but he further maintains that he is an occupancy raiyat and that in any event he cannot be turned out. He further says that there was a compromise between him and the plaintiff in suit No. 80 of 1927, and that he, in any event cannot be turned out of his land. A defence similar to this defence has also been taken by the first set of pro forma defendants Nos. 28 to 53. The plaintiff in her plaint does not ask for possession by turning them out, but seeks for possession in case she is entitled to *khas* possession, through these last mentioned defendants.

We have already stated that the learned Subordinate Judge held that the plaintiff was not entitled to an unconditional decree for *khas* possession. He has held that the rates proposed by the plaintiff in her notices are fair and equitable and that there was no refusal on the part of any of the defendants to take a fresh settlement from the plaintiff on reasonable rent. In his judgment he has explained away the conduct of defendant No. 1 when he refused to accept the registered letter containing the notice addressed to him. The learned Subordinate Judge has settled the rent at Rs. 817/2/- a year, and has said that if the defendants Nos. 1 to 22 (series) refused to accept the rent within two months of his decree then in that event defendants Nos. 1 to 22 series will be ejected from the land. The decree which was made, is really a conditional decree for ejectment, the condition being the acceptance or refusal of rent found by the Court to be fair and reasonable. The plaintiff has not appealed from this decree, nor has she preferred a memorandum of cross-objection directed against the appellants, namely, defendants Nos. 1 to 22 series. The plaintiff respondent, cannot in our judgment, urge any contention to the effect that at the date of the suit, the said defendants or any one of them were trespassers and that an unconditional decree for *Khas* possession ought to have been granted against them.

Mr. Sarkar who appears for the plaintiff respondent attempted to argue before as that after Kartic 1330, namely, on the expiry

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of the term limited in the *Kabuliat* Exhibit 4 (a), defendant No. 1, or if he was the benamdar of Asiruddin (now dead) and Kazimuddin and his cosharers,—defendants Nos. 1 to 22 series were trespassers. This argument is against the plaintiff's case in the plaint, for in paragraph 3 of the plaint, the plaintiff makes a case that the rights of the said principal defendants ceased only in 1934 when they refused to take the settlement proposed by her. In any event not having preferred a memorandum of cross objection against the said defendants Mr. Sarkar is not entitled to raise this point when he is appearing for the respondent in support of the decree. The only question therefore, which is open to Mr. Sarkar to take is whether the rent settled by the learned Subordinate Judge is fair or reasonable.

Dr. Pal who appears for the appellants, places his case in the following manner. He says that Asiruddin and Kazimuddin were raiyats. As soon as they were given settlement by Exhibit 4 (a) they become non-occupancy raiyats and continued to be non-occupancy raiyats up to the year 1332 B. S. The land being Char land, Chapter V of the Bengal Tenancy Act is excluded but not Chapter VI, and in such lands a raiyat can acquire occupancy right by continuous possession for twelve years. He says that Asiruddin and Kazimuddin and after them defendant No. 1, even if defendant No. 1 is held to be the real purchaser at the rent sale, have been in continuous occupation for more than twelve years. Therefore the status of defendant No. 1 or of the principal defendants, as the case may be, is that of occupancy raiyats. The plaintiff can only get rent enhanced under Section 30 of the Bengal Tenancy Act. Her whole claim proceeds upon a misconception, because she has not framed the suit under Section 30 of the Bengal Tenancy Act. The rent which was reserved in the Kabuliat Exhibit 4(a) cannot be enhanced on the plaint as made, and there is a further bar to any enhancement for another ten years by reason of the provisions of Section 75A introduced by the last Bengal Tenancy Amendment Act (Act VI of 1938 B. C.) which came into force on the 18th August, 1938.

Dr. Pal's second line of argument is this :even if the settlement holders upon Exhibit 4(a) and their successors were not raiyats but non-permanent tenure-holders, there cannot be any enhancement of rent inasmuch as the suit has not been brought under Section 7 of the Bengal Tenancy Act, there being no allegation in the plaint that there was no customary rate for the tenure-holders in the locality.

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Dr. Pal's third point is that even if his first two points are overruled, the rent settled by the learned Subordinate Judge is unfair, and in any event the rent cannot be more than about ten annas a *bigha*.

Mr. Sarkar meets these arguments, and in our opinion meets the first two successfully, but we think that we ought to give relief to Dr. Pal's clients on the basis of the third ground which he has urged before us.

The first question of importance is what was the status of Asiruddin and Kazimuddin. In the year 1921 the record-of-rights was finally published and in the record-of-rights they were described as raiyats. The record-of rights would have been of great value, but in this case inasmuch as their tenancies began with a written document, the rights of the parties must be determined by reference to the terms of the document. The record-of-rights no doubt affords a presumption, but in the circumstances of this case that presumption is of little importance.

The land demised by Exhibit 4(a) has more than 100 Bighas in area, and the presumption arising under Section 5 of the Bengal Tenancy Act is that the settlement holders Asiruddin and Kazimuddin were tenure-holders. In accordance with the principle laid down by the Judicial Committee of the Privy Council in the case of *Debendra Nath Das* v. *Bibudhendra Bhramarbar Roy* (1) the onus is on those who claim to be raiyats to rebut the said presumption and thus they can do it by showing from the lease itself, if the lease is of an unambiguous nature, that they had acquired the right to hold the land for the purpose of cultivating it themselves etc; if the terms of the lease are ambiguous, the surrounding circumstances must be looked at. In our judgment the terms of the lease do not indicate for certain that Asiruddin and Kazimuddin were given the rights of the raiyat. In Exhibit 4(a) Asiruddin described himself as a Zemindar and Jotedar, and Kazimuddin as a Jotedar. The oral evidence adduced in the case gives us some indication of the sense in which the word "Jotedar" is used in the locality. 'Jotedar' here does not mean a cultivator of a Jote or holding. It means a big landed tenure-holder. There are three passages in the document on which Dr. Pal has relied for the purpose of showing that Asiruddin and Kazimuddin took the settlement for the purpose of reclaiming the land and cultivating it themselves or through their servants. The first of those passages says that the Zemindar had given notice for

(1) (1918) L. R. 45 I. A. 67; I. L. R. 45 Calc. 805; 27 C. L. J. 543.

Meadi Jote settlement of lands for the purpose of bringing them under cultivation. The second passage is corresponding to the first, and the tenants say that they were taking the settlement for the purpose of bringing the lands under cultivation. These two passages which correspond to each other, merely mean that the lands which were the subject matter of the settlement were unclaimed lands producing no yield and the Zemindar wanted to turn them into a profitable concern by having them reclaimed not by her exertions but through her tenants. These two passages did not indicate for certain that Asiruddin and Kazimuddin were themselves to reclaim the lands and bring them under cultivation through their own plough. The last passage on which Dr. Pal relies is as follows: "We will cultivate the lands by keeping intact the possession and the bounds and limits, and will be careful as to the increase of the fertility of the soil. He says that this passage indicates that Asiruddin and Kazimuddin were themselves to cultivate the land. In our judgment this is not the meaning of this covenant. The covenant here intended to impose an obligation on the tenants to keep the boundaries intact, that is to say, the tenants undertook to maintain intact the possession of their landlord by maintaining their own possession. We accordingly hold that the terms of the lease do not indicate for what purpose the tenancy was granted. It was a reclamation lease, but the agency through which the reclamation would be carried is not mentioned. It could have been carried by Asiruddin and Kazimuddin or they were free to reclaim it through their sub-tenants.

The oral evidence discloses that immediately after taking the settlement, Asiruddin and Kazimuddin only reclaimed by the first year 10 to 15 cottas of land. Sefatulla, defendant No. 23 was put in poseession of the whole Char and a formal *Amalnama* was executed in his favour by Kazimuddin. In 1326, and in 1327 he executed Kabuliats in favour of Asiruddin and Kazimuddin in respect of the whole land. The evidence is that either Sefatulla cleared the lands and brought them under cultivation or had them cleared by his sub-tenants. The evidence which is given by Sefatulla, is supported by the recitals in Exhibit B, which he executed in favour of Kazimuddin (not printed in Paper-book.) This evidence along with the description of the lessees in the Kabuliat Exhibit 4(a), indicates that the status of these persons was not that of raiyats but of tenure-holders, who had been given the settlement for a term of ten years with an option of renewal. We accordingly overrule the first point raised by Dr. Pal.

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With regard to the second point of Dr. Pal that there cannot be any enhancement on the basis adopted by the Subordinate Judge as in the plaint the customary rate is not mentioned it appears that this point has been raised for the first time in this Court, and if it had been raised in the Court of first instance it would have been successfully met as evidence coming from Dr. Pal's client leads to the inference that there was no customary rate of tenures in the Char. We accordingly overrule the second point. There only remains the consideration of the question as as to whether the rent assessed by the Court below is fair and equitable rent.

Mr. Roy who appears for defendant No. 23 (respondent No. 2), says that we ought to find that his client is a raiyat and he has by this time acquired the right of occupancy. If there had not been Act VI of 1938 in force, the status of defendant No. 23 would have been material, for if he is an occupancy raiyat he cannot be ejected by anybody except on the grounds mentioned in Section 25 of the Bengal Tenancy Act and his rent could have been enhanced only under the provisions of Section 30 of the Bengal Tenancy Act: Asiruddin and Kazimuddin or their successors being tenure-holders, they would have been entitled to retain something for collection charges and tenure-holder's profit. Inasmuch as the whole of the Char has been let out to Sefatulla at the rate of one rupee a Bigha, the fair rate payable to the plaintiff would in that case have to be determined on the basis that the tenure-holders could have got only one rupee per Bigha from their tenant Sefatulla with the prospect that that rent might be increased later on under the provisions of Section 30 the Bengal Tenancy Act, but as we have already said the provisions of Act VI of 1938 make it unnecessary for us to determine the exact status of Sefatulla. He may be a raiyat or tenure-holder. We do not, therefore, determine that question in the present proceeding. The position therefore, is this: that under the Kabuliat Exhibits B and B1 the principal defendants (we are proceeding upon the basis on which the learned Subordinate Judge has proceeded, namely that defendants Nos. 1 to 22 series are the persons to whom the rights given to Asiruddin and Kazimdddin had devolved) can only realize from Sefatulla rent at the rate of one rupee per Bigha for the next ten years beginning from the 16th August, 1938. The rent which has to be imposed upon them cannot be an equitable one if it exceeds rupee one a Bigha. At least this will be the position till Section 75A introduced by

Act VI of 1938 spends its force. According to our findings, the said defendants are tenure-holders. They must have something for their collection charges and seeing that they have to collect rent from one person only *viz*., Sefatulla, with the contingency that they may have to sue Sefatulla for rent, we think that five per cent ought to be deducted on account of collection charges, and that twenty five per cent ought to be given as their profits.

We therefore, take as the basis of our calculation, the rent payable by Sefatulla, *i.e.* flat rate of one rupee per Bigha for the entire land of the Char and giving the tenuure-holders namely, the principal defendants a margin of five annas in the rupee to cover their collection charges and profits. We, therefore think that the fair rate will be eleven annas flat rate per Bigha for 399 Bighas odd claimed in the plaint.

The learned Subordinate Judge in coming at his figures proceeded upon the bid-sheet (Ex. 5). The highest bid for a *raiyatwari* settlement was Rs. 2 per Bigha. The learned Subordinate Judge has also relied upon Exhibit 4 series which are kabuliats which Sefatulla's tenant executed in his favour. They were kabuliats executed by actual cultivators removed about three degrees from the principal defendants, for small plots of land. There is, therefore no direct evidence of what will be the fair rent for a tenure-holder to pay. Ex. 5 and Ex. 4 cannot in our judgment be taken as good evidence to determine his rent. We are therefore, left, with the only basis on which we can make our calculation, *viz*, on the basis of the rent payable by Sefatulla who is a tenant in respect of the entire land holding directly under the principal defendants.

We, accordingly, modify the judgment and decree of the learned Subordinate Judge and assess the fair rent at the rate of eleven annas per Bigha on an area of 399 Bighas odd as mentioned in the plaint. If the principal defendants, namely, defendants Nos. 1 to 22 series or any one of them, within three months of the date of our judgment notifies to the lower Court by a duly signed and verified petition that he or they are willing to accept the same, there will be no ejectment. In default the plaintiff will have the right to eject them in execution of this decree, and in that case the plaintiff will have a decree for mesne profits, the amount will be assessed in further proceedings. If one of the said defendants or all the said defendants notify within the said time their intention to accept the rent which we have found as fair and equitable for a period terminating with Kartic 1355 B. S., the plaintiff

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Syed Uddin Ahammed v. Maharani Hemanta-Kumari Devi.

would get a decree for rent at the same rate for the years 1338 to 1341 as claimed in the plaint together with cesses and damages according to law.

The rent which we settle will be for a period terminating with Kartic 1355 B. S. Whether the defendants will be entitled to remain on the land after 1355 is not a question before us and we do not express any opinion on the same point.

The costs of the lower Court payable to the respective parties will be in proportion to their success in this Court on the alternative claim made in prayer (*ga*) of the plaint.

So far as the costs of this Court is concerned each party will bear their own costs, but the plaintiff must pay to the appellants the amount of court fees payable on the sum of money for which we have given them relief.

A. T. M. *Decree varied: Cross-objection dismissed.*

Before Mr. Justice N. R. Khundkar and Mr. Justice R. F. Lodge.

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July, 9, 16,

UDAY CHANDRA PAL AND OTHERS

v.

B. H. PARMAR

alias

BHAWAN HARBHAN PARMAR AND OTHERS.*

Declaratory decree—Specific Relief Act (I of 1877), section 42—Discretion—Appellate Court, when can interfere—Statement of legal consequences.

It is not a matter of absolute right to obtain a declaratory decree. It is discretionary with the Court to grant it or not, and in every case the Court must exercise a sound judgment as to whether it is reasonable or not under all the circumstances of the case to grant the relief prayed for.

* Appeal from Appellate Decree No. 1646 of 1939, against the decree of H. G. S. Bivar, Esq., District Judge of Burdwan, dated the 1st August, 1939, reversing that of J. P. Banerjee Esq., Subordinate Judge of Asansole, dated the 28th February, 1939.

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Sreenarain Mitter v. *Sreemutty Kishen Soondery Dassee* (1) referred to.

In a case where the discretionary power to award declaratory relief has been exercised in a manner grossly inconsistent with judicial principles the Court of appeal has power to interfere.

A declaration by a Court which is virtually a statement of the legal consequences of non-registration under section 49 of the Indian Registration Act, 1908, of the lease embodied in a compromise decree, is not contemplated by section 42 of the Specific Relief Act, 1877.

Lankapara Tea Company, Limited v. *Gopalpur Tea Company, Limited* (2) referred to.

Appeal by the Plaintiffs.

Suit for a declaration that a decree based upon a Solenama was illegal, fraudulent, inoperative and void and for an order that the said decree be set aside. Fraud was negatived by Court below. The trial Court granted a declaration that the Solenama not being registered was under the law inoperative and not binding upon the plaintiffs under section 49 of the Indian Registration Act, 1908. This declaration was reversed by the appellate Court.

Messrs. Bankim Chandra Mukherji and *Purusottum Chatterji* for the Appellants.

Dr. Radhabenode Pal and *Mr. Pankoj Kumar Mukherji* for the Respondents.

C. A. V.

The judgments of the Court were as follows :

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Khundkar, J :—This appeal arises out of a suit in which the plaintiffs who are the appellants here prayed for a declaration that a decree based upon a Solenama was illegal, fraudulent, inoperative and void, and for an order that the said decree be set aside.

The material facts are as follows :—The plaintiffs appellants who are four in number are the Darputnidars of a Mouza known as Mouza Bendi. In 1894 their predecessors granted a mining lease of this Mouza to one Mr. White who subsequently transferred his rights to the defendant No. 2. On the 2nd August, 1935, the plaintiffs by a registered deed of conveyance transferred to the defendant No. 1 their right to receive royalty for the years 1930 to 1946. Later the defendant No. 1 executed a deed of agreement by which she undertook to pay to the plaintiffs a certain proportion of the royalty for the years 1930 to 1946.

In 1937 a suit for the recovery of royalty was instituted against defendants Nos. 2 and 3. The plaintiffs in that suit were the

(1) (1873) 11 B. L. R. 171 ; L. R. I. A. Supp. Vol. 149.
(2) (1936) I. L. R. 63 Calc. 1008 ; 63 C. L. J. 210.

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four plaintiffs appellants and the defendant No. 1 in the suit out of which this appeal arises. The suit was compromised and a decree was passed embodying the Solenama. The minimum royalty payable under the original lease was Rs. 80 per annum, but under the terms of the Solenama the defendants agreed to pay Rs. 500 per annum as royalty which would be a first charge upon the colliery.

In the present suit the plaintiffs appellants alleged that fraud had been practised upon them by the defendants, that the former suit had been instituted without their knowledge, that the husband of the first defendant in the present suit had contrived to get the former suit instituted with the assistance of papers which had been used as Vakalatnamas, but upon which he had obtained the signatures of the appellants at a time when those papers were blank.

The learned Subordinate Judge found that there had been no fraud, but held that the plaintiffs were entitled to a declaration that the Solenama embodied in the decree in the earlier suit was inoperative and not binding upon the parties for want of rigistration under section 49 of the Registration Act. The defendants appealed and the plaintiffs filed a cross-objection in which they prayed for a declaration that the decree was void on the ground of fraud. The learned District Judge who heard the appeal upheld the finding of the learned Subordinate Judge that there had been no fraud, but he also held that the learned Subordinate Judge had not acted in the proper exercise of his discretion under Section 42 of the Specific Relief Act in granting the declaration just referred to. He accordingly reversed the order of the learned Subordinate Judge and dismissed the suit.

The only point urged in the present appeal on behalf of the appellants is that they are entitled to the declaration which was granted by the learned Subordinate Judge. Mr. Mukherji has in support of this contention invited our attention to paragraph 10 of the plaint which is in these terms:—"The plaintiffs further state that the aforesaid Solenama not being signed, executed and registered according to law is for all reasons void and inoperative and no decree can be passed on its basis". Mr. Mukherji has contended that the declaration granted by the learned Subordinate Judge was within his discretion, and that in any event the exercise of that discretion was not a matter with which the lower appellate Court should interfere. In support of this contention Mr. Mukherji

has cited the following cases: *Isri Dut Koer* v. *Hansbutti Koerain* (1) was a decision of the Privy Council in an appeal which arose out of a suit brought during the life of a Hindu widow by the presumptive heir, entitled on her death to the possession of the property in which she held her limited estate, to have an alienation by her declared to operate only for her life. The High Court on appeal held that the plaintiff was not entitled to the declaration prayed for for reasons which Mr. Justice Ainslie stated* as follows:—

"It seems to me that we ought not to allow this suit to be protracted and great additional expense to be incurred, when it is quite possible that the widows or one of them may survive the plaintiffs, so that the estate may never vest in them and the decision arrived at may prove no bar to further litigation.

"For the purposes of this appeal it is sufficient to say that the Court will not, in a declaratory suit, decide intricate questions of law, when no immediate effect and possibly no future effect can be given to its decision, and when the postponement of the decision to the time when there may be before the Court some person entitled to immediate relief (if the decision is in favour of the plaintiff) will not prejudice his rights in any way." Mr. Mukherji has relied upon a passage in the decision of their Lordships of the Privy Council which appears at page 333 of the report:

" But their Lordships think that a strong case of inexpediency should be shown for refusing declaratory relief to classes of persons expressly recognized by the law as suitors for such relief."

That however is not a complete statement of the principle of their Lordships' decision which goes on to state:—

" They do not say that there may not be such a case, but they cannot find it here.

" The only reason assigned for refusing relief on the ground of discretion is that part of the case raises a difficult point of law, the decision of which, though involving expense and delay, may after all not be binding upon the actual reversioners. That may be a reason more or less weighty according to circumstances . . . . If the defendants had in the first instance objected to declaratory relief and had taken the opinion of the Subordinate Judge on that point, there would then have been more ground for refusing relief in order to save expense and litigation. But

(1) (1883) I. L. R. 10 Calc. 324.

*See p. 331 of the Report-Rep.

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they did not do that. They disputed the whole case of the plaintiff. An important issue of fact, and two important issues of law, were decided by the first Court in the plaintiff's favour. After all this it comes very late for the Court above to reverse the action of the Court below on the ground of discretion and in order to save further litigation and expense."

In our judgment the decision just referred to is no authority for the contention raised in the appeal before us. In the case relied on the defendants had not objected to the declaratory relief in the trial Court, and the question was raised for the first time in appeal in the High Court which refused the relief in order to prevent protraction of the litigation and further expense.

Mr. Mukherji next relied on the language of a portion of the head-note in the case of *Kunwar Pratab Singh* v. *Bhabuti Singh* (1) which reads as follows:—"Held—that Section 42 of the Specific Relief Act did not apply to a suit by P and A for a declaration that the decree in B's suit was not binding on them and to have the decree in their own suit set aside." The only justification for this wording is a passage in the decision of their Lordships of the Privy Council at page 1172* of the report which is in the following terms:—"The Judicial Commissioner and the First Additional Judicial Commissioner having differed in opinion on the point of law as to whether Section 42 of the Specific Relief Act, 1877, applied to the case, directed that the appeal should be laid before the Second Additional Judicial Commissioner under Section 98 of the Code of Civil Procedure, 1908. The Second Addtional Commissioner did not apparently confine himself to a consideration of the point of law with which alone he had under Section 98 of the Code of Civil Procedure, 1908 jurisdiction to deal; he apparently agreed with the opinion of the First Additional Judicial Commissioner that Section 42 of the Specific Relief Act, 1877, applied, and held that the appeal should be allowed and the suit should be dismissed with costs in both Courts." The decision of their Lordships was that the appellants P and A should have a decree setting aside the decree in their suit and declaring that the agreement of compromise and the decree in the suit of B were not binding upon them. Even though the declaration prayed for was granted we do not find it possible to read into this decision the implication of the head-note that the Privy Council held that Section 42 of the Specific Relief Act did not apply.

(1) (1913) 17 C. W. N. 1165; I. L. R. 35 All. 487; 18 C. L. J. 384.

* Or. page 392 of 18 C. L. J.—Rep.

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Mr. Mukherji then drew our attention to a passage in the judgment in the case of *Sant Kumar* v. *Deo Saran* (1) in which Mr. Justice Mahmood stated :—"I hold that, so long as a Court of first instance possesses jurisdiction to entertain a declaratory suit, so long as that Court entering into the merits of the plaintiff's case arrives at right conclusions and awards a declaratory decree, such a decree cannot be reversed in appeal simply because the discretion has been improperly exercised. I know that in saying this I am laying down a strong proposition of law....................." The principle of that decision so far as it related to Section 42 of the Specific Relief Act is accurately summarised in the concluding portion of the head-note at page 366 :—

"The awarding of declaratory relief, as regulated by Section 42 of the Specific Relief Act, is a discretionary power which Courts of Equity are empowered to exercise with reference to the circumstances of each case and the nature of the facts stated in the plaint, and the prayer of the plaintiff; that so long as a Court of first instance possesses jurisdiction to entertain a declaratory suit, and entering into the merits of the case arrives at right conclusions and awards a declaratory decree, such a decree cannot be reversed in appeal simply because the discretion has been improperly exercised; and that such improper exercise of discretion under Section 42 of the Specific Relief Act has no higher footing than that of an error defect or irregularity, not affecting the merits of the case or the jurisdiction of the Court, within the meaning of Section 578 of the Civil Procedure Code.

"This does not imply that, even in cases where the discretionary power to award declaratory relief has been exercised wholly arbitrarily, and in a manner grossly inconsistent with judicial principles, the Court of appeal would have no power to interfere."

In our judgment it is the last sentence that is of importance for the purposes of the appeal before us. Can it be said that the discretion to award declaratory relief was exercised by the trial Court in a manner not grossly inconsistent with judicial principles? The plaintiffs prayed in the first instance for a declaration that the compromise decree was void on the ground of fraud. Fraud had been negatived by both the Courts below, but the trial Court granted the plaintiffs a declaration that the Solenama not being registered under the law is not binding upon the plaintiffs under Section 49 of the Registration Act. It should be noted that the

(1) : (1886) I. L. R. 8 All. 365 (374).

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Solenama embodied the terms of the lease, and the Solenama itself was merged in the decree. The effect of the trial Court's decision therefore is that the lease embodied in the decree not having been registered is not binding upon the plaintiffs under Section 49 of the Registration Act. Now that section is in the following terms :—

"No document required by section 17 or by any provision of the Transfer of Property Act, 1882, to be registered shall—

(a) affect any immoveable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered.

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, or as evidence of part performance of a contract for the purposes of section 53A of the Transfer of Property Act, 1882, or as evidence of any collateral transaction not required to be effected by a registered instrument."

The declaration granted by the trial Court that the Solenama is not binding upon the plaintiffs under section 49 of the Registration Act amounts to no more than saying that the legal consequences of non-registration enumerated in section 49 attach to the decree in which the Solenama is embodied. It is not a declaration that the decree is void, because it may still be received as evidence of contract in a suit for specific performance, or as evidence of part performance of a contract for purposes of section 53A of the Transfer of Property Act, or as evidence of any collateral transaction not required to be effected by a registered instrument.

In the case of *Sreenarain Mitter* v. *Sreemutty Kishen Soondery Dassee* (1), it was held that it is not a matter of absolute right to obtain a declaratory decree. It is discretionary with the Court to grant it or not, and in every case the Court must exercise a sound judgment as to whether it is reasonable or not under all the circumstances of the case to grant the relief prayed for. This case was cited with approval in the case of *Lankapara Tea Company Limited* v. *Gopalpur Tea Company Limited* (2). In the latter case the reliefs which the plaintiff had prayed for included certain declarations based on the rights of the plaintiff as the lower riparian owner,

(1) (1873) 11 B. L. R. 171 ; L. R. I. A. Sup. 149.
(2) (1936) I. L. R. 63 Calc. 1008 ; 63 C. L. J. 210.

and the disabilities of the defendant as the upper riparian owner in respect of a river. With respect to these reliefs the trial Court's direction was as follows :—"Plaintiff's right to have the free and natural flow of the Pugli river through its original and natural course be declared, and it be declared that the defendants Nos. 1 and 2 have no right to interfere with the right subject to the terms of the compromise with defendant No. 1 ; and subject to the compromise between the plaintiff and defendant No. 1, it be declared that the defendants Nos. 1 and 2 have no right to erect bunds etc. in the bed of the Pugli, to narrow down the bed or divert the waters of the Pugli from its original and natural course, or to obstruct the free and natural flow of the Pugli through its original and natural course." On appeal this Court held* that it was not prepared to support the bare declaration for more reasons than one. One of the reasons was that the declaration was unnecessary because it purported merely to recite the law, such as the learned Judge understood it to be, and was not likely to be of any real utility to the plaintiff ; for in a future suit which he might have to institute should any fresh obstruction be caused, this declaration he would, have without any difficulty, the moment he showed that he was a lower riparian owner and that there had been no contract which precluded him from his rights as such.

Now, it seems to us that the declaration granted by the learned Subordinate Judge in the present case was virtually a statement of the legal consequences of non-registration under section 49 of the Registration Act of the lease embodied in the compromise decree ; and we are of the opinion that such a declaration is not contemplated by section 42 of the Specific Relief Act, and that the lower appellate Court acted rightly in reversing the decree of the learned trial Court.

This appeal accordingly fails and it is dismissed with costs. The hearing-fee is assessed at two gold mohurs.

Lodge, J. :—I agree.

A. T. M. *Appeal dismissed.*

* See page 227 of 63 C. L. J.—Rep.

Before Mr. Justice R. C. Mitter and Justice Mr. A. S. M. Akram.

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August, 6.

RAJA JAGAT KISHORE ACHARYYA CHAUDHURY AND ON HIS DEATH HIS HEIRS AND LEGAL REPRESENTATIVES KUMAR JITENDRA KISHORE ACHARYYA CHAUDHURY AND OTHERS

v.

KULA KAMINI DASSYA AND OTHERS.*

Suit for possession—Trust deed—Defence of deed being fraudulent, if can be raised.

Where the plaintiff seeks to recover possession of property on the basis of trust deed, a defendant is entitled to plead by way of defence the fact that the plaintiff should not be allowed to recover on the basis of the said document as the document was a fraudulent one intended to defeat the rights of the creditor of which the defendant was one. If the fraud is established, the plaintiff cannot ask for relief on the basis of the said document. It is one of the fundamental duties of the Court to prevent fraud being committed.

Appeal by the Defendants.

Suit for recovery of property.

The material facts appear from the judgment.

Dr. N. C. Sen Gupta, Messrs. Jogesh Chandra Roy, Kali Kinkar Chakravarty, Surajit Chandra Lahiri and *Tarapada Ghose* for the Appellants.

Messss. Amarendra Nath Bose, Birendra Kumar De, Tapadhir Kumar Rai Dastidar, Abani Kanta Rai, Mohendra Kumar Ghose and *Bepin Chandra Bose* for the Respondents.

The following judgment was delivered :

August, 6. One Kamala Kanta Tarafdar was a wealthy man. He died leaving immoveable properties of considerable value as also a money-lending business of an extensive character. His death occurred in August, 1904. He left him surviving his widow Kula Kamini and two minor sons Dharani and Tarini. Before his death he executed a Will by which he appointed his widow Kula Kamani executrix during the minority of his sons. By the Will he gave his properties to his two sons Dharani and Tarini. Kula Kamini applied for probate of the said Will. The order for probate was made on the 29th of

*Appeal from Original Decree No. 184 of 1938, against the decree of A. K. Guha Esq., Subordinate Judge, 1st Court, of Mymensinsingh, dated the 16th May, 1938.

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July, 1905 and probate was actually issued to her on the 7th of September, 1905. After taking out probate she went into possession as executrix of the estate of her deceased husband and got her name registered as executrix in respect of the properties left by her deceased husband. Dharani, the eldest son, attained majority in the year 1908 or 1909 and Tarini, the youngest, in 1911. On the 16th of March, 1913, Dharani along with two others Abedulla and Jamser took a lease of the 8 annas share of a certain forest from Raja Jagat Kishore for a term of 6 years. In the said forest Kamala Kanta had 1 anna odd gandas share as proprietor and Raja Jagat Kishore had 8 annas share. The lease was to begin from the 1st of Chaitra, 1319, and to terminate on the 30th of Falgun, 1325. The total rent payable under this lease to Raja Jagat Kishore was Rs. 50,000, Rs. 20,000 out of the the said sum was paid at the date of the instrument of the lease and the remaining sum of Rs. 30.000 was made payable in two instalments, Rs. 12,000 on or before the 30th of Sravan, 1320 corresponding to the 15th August, 1913, and the balance Rs. 18,000 on or before the 30th Kartick, 1321, corresponding to the 16th of November, 1914. In default of payment of the said instalments interest was to run at the rate of Rs. 3-2-0 per cent per month. As we construe the lease, there was a provision that in default of payment of the first instalment of Rs. 12,000 the whole of the balance would become due and payable.

A large portion of the balance of rent was not paid to Raja Jagat Kishore with the result that on the 12th January, 1916, he instituted a suit for recovery of the amounts due to him against Dharani, Abedulla and Jamser. On the 31st of January, 1917, a consent decree for Rs. 20,000 was passed in his favour. On the 28th of January, 1918, the Raja started an execution against the properties in suit which had been the properties of Kamala Kanta but which had devolved upon Dharani and Tarini by virtue of his Will. The property in suit was sold in course of that execution and purchased by the Raja himself on the 15th of July, 1919. Proceedings to set aside the said sale, started at the instance of the judgment-debtor, succeeded in the Court of first instance but on appeal the said sale was confirmed by this Court by its order dated the 18th of August, 1923. On the 4th of June, 1924, the sale certificate was issued to the Raja who took actual possession of the property purchased by him on the 5th July following. Thereafter the Raja sold some portions of the properties purchased by him to defendants Nos. 2 and 3 who in turn sold a portion

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thereof to defendant No. 4. The present suit is a suit for recovery of possession instituted by Kula Kamini on the basis of a trust deed, Ext. 1 executed in her favour by her sons on the 28th of April, 1914. This suit was instituted on the 15th June, 1936, that is, a few days before the expiry of the period of limitation. In the said deed of trust, Ext. 1 all the properties of Tarini and Dharani which they had got from their father as also the lease-hold interest in the said forest were included. Nothing was left out of the trust deed. Kula Kamini, however, was not made a party to Raja Jagat Kishore's rent suit or in the execution proceedings which followed and in which the property in suit was ultimately purchased by the Raja.

The plaint proceeds on the footing that by reason of the execution of the trust deed on the 28th of April, 1914, in her favour by her sons Dharani and Tarini, the property in suit as well as other properties had vested in her, and inasmuch as she was not made a party either in the rent suit of Raja Jagat Kishore or in the execution proceedings the title which had vested in her as trustee has not been affected by the purchase of Raja Jagat Kishore at the execution sale. The suit, therefore is entirely founded on the said trust deed, Ext. 1. The material portion of the defence which has been placed before us and on which the argument of Dr. Sen Gupta has proceeded is as follows: (1) that the document, Ext. 1, is not a trust deed at all. It is only a deed by which the management of the properties was conferred by Tarini and Dharani on their mother, the plaintiff, (2) that the said document, Ext. 1, represented a paper transaction; and (3) that it was a document executed with the intent of defrauding the creditors of Tarini and Dharani, that is to say, it was merely a cloak to shield the properties from their creditors.

The learned Subordinate Judge has overruled all the defences and has passed a decree in favour of the plaintiff for possession. In the appeal before us the three points which we have noticed above have been argued on behalf of the defendants to the suit, namely the heirs of Raja Jagat Kishore and defendants Nos. 2, 3 and 4 who have derived title from Raja Jagat Kishore. We cannot accept the first contention of Dr. Sen Gupta. In our judgment, the document, Ext. 1, according to its purport, is not a mere deed of management. It is a trust deed, for the title to the properties by the terms of the document vested in the plaintiff Kula Kamini. By the terms of the document she was to take upon herself the obligation to maintain the family of Dharani and

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Tarini. According to its terms it is a trust deed and not a document for management of the properties of Tarini and Dharani. We accordingly over-rule the first point raised by Dr. Sen Gupta. We will now proceed to consider the second and third points together.

It appears from the copy of the probate, Exhibit 19, produced in this case, that the estate of Kamala Kanta wss valued at Rs. 1,20,227-0-7 pies. We have in evidence that the net income of the immovable properties left by him was about Rs. 4,000 a year and the capital in his money-lending business was about Rs. 70,000 to Rs. 80,000. We further have in evidence that during the time that Kula Kamini was acting as the executrix she incurred no debts but in fact acquired some properties, partly out of the income of the properties left by Kamala Kanta and partly by employing a portion of the money of the money-lending business. The position, however, is well established that there were no debts at the time when she was managing the properties as executrix. According to the terms of the Will, her executrixship ceased about the year 1911 when the youngest son of Kamala Kanta, namely, Tarini, attained majority. The financial position of the family, however, changed considerably in the space of a very short time thereafter. We have the definite evidence that in 1913 Dharani and Tarini had recourse to borrowing heavy amounts. On the 21st of March, 1913, they along with Abedulla and Jamser borrowed Rs. 60,000 by executing a mortgage in favour of Binayak Das Acharjee Choudhury of Muktagacha. This was five days after the lease granted by Raja Jagat Kishore. Probably, out of the sum of Rs. 60,000 so borrowed, Rs. 20,000 which was payable on the date of the execution of the said lease was paid. There is also evidence that about this time they were indebted to the extent of about Rs. 10,000 partly secured and partly unsecured, to one Balmukund Misir and they were further indebted to the extent of about Rs. 2,000 to Raja Bijoy Singh Dudhuria. The position, therefore in 1913 was that all the capital of the money-lending business left by Kamala Kanta had disappeared and the two sons were involved in heavy financial obligations. Under the terms of the lease which Dharani had taken along with Abedulla and Jamser from Raja Jagat Kishore, Dharani along with his two co-tenants became liable to pay Rs. 30,000 to Raja Jagat Kishore within a very short time. In the earlier part of our judgment we have indicated the time of the payment of the instalments of Rs. 30,000 made payable under the lease. The evidence further establishes the fact that Dharani could not make

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anything out of the lease which he had taken along with Abedulla and Jamser from Raja Jagat Kishore. The evidence indicates that Dharani could not get any share of the profits of the said concern and all the profits were being taken by his co-tenants and co-partners, namely Abedulla and Jamser. That was the position after 1913. Not only heavy debts had been incurred, both secured and unsecured, but there was that doubtful venture undertaken by Dharani, namely, of working the forest of which he and his co-partners had taken a lease from Raja Jagat Kishore. In these circumstances, the trust deed was executed on the 28th April, 1914. We are to see whether the trust deed was a *bona fide* document or was a fraudulent device for the purposes of defeating or delaying the creditors of Tarini and Dharani, or a cloak to shield the properties of Tarini and Dharani. For the purposes of considering this question we would have to take into consideration the financial position of Tarini and Dharani at the time of the execution of the document together with the terms of the trust deed.

The trust deed recites that Kula Kamini, the mother, had been successful in managing the estate of Kamala Kanta in her capacity as executrix. It further recites that it would be better to leave the management still in her hands. The obligation under this trust was the trustee was to maintain the family of Dharani and Tarini. In the document it is recited that there were debts of Tarini and Dharani to pay. But the provision for the payment of the debts is as follows :—That those debts were to be cleared up from the profits and income of the properties included in the trust. The trustee will have no power to sell or mortgage any of the properties on any account, but in case of necessity she could only contract a debt up to the amount of Rs. 10,000 on mortgage of the properties if she was so advised by four named persons whose advice she was directed to take in cases of difficulty.

We have already indicated the amount of indebtedness of Dharani and Tarini at the time of the execution of the trust deed as also the income from the immoveable properties. We have also found that in the year 1913 the money-lending business left by Kamala Kant had disappeared. The income of the immoveable properties in the year 1914 was accordingly quite insufficient for the purposes of keeping down the interest of the debts even in the share of Dharani and Tarini. The trust deed was executed a year after the lease of Raja Jagat Kishore and during the course of the year it had become quite apparent to Dharani and Tarini and their well-wishers that the Rs. 30,000 left outstanding to Raja Jagat

Kishore could not be paid from out of the income and profits of the forest and that there was every chance of Raja Jagat Kishore realising the same from their properties. A large portion of the immoveable properties of Dharani and Tarini had already been mortgaged to Binayak Das Acharjee Choudhury and it must have been foreseen that the other properties of Dharani would be proceeded against by the Raja for realising his dues due under the said lease. The position must have been realised about the time of the execution of the trust that nearly all the properties of the family would be taken in execution by the Raja and Binayak Das Acharjee Choudhury. These circumstances lead us to the conclusion that the trust deed was a fraudulent deed executed with the intent of shielding the properties from the claims of the creditors of Dharani and Tarini. It was a mere cloak intended to serve as a shield against the just claims of the creditors. The subsequent dealings of Dharani and Kula Kamini would also point to the conclusion that the trust deed was only meant to be a cloak for retaining the properties in the family by defeating, if possible, the claims of the creditors. In 1919 we find four fictitious mortgages executed by Dharani and Kula Kamini for heavy amounts in the short space of a few days, namely end of June and the beginning of July, 1919. Those mortgages were in our view executed to serve as a second line of defence if their plan on the trust deed happened to fail.

No doubt after the execution of the trust deed Kulakamini purported to act as trustee. She executed as trustee a deed of management, she executed leases as trustee of the properties, she instituted and defended suits as trustee and the collections were made in her name as trustee. In some of the properties she also had her name registered as trustee, but in our judgment these facts can have no important bearing on the question and to us it seems that those acts were done only for the purposes of keeping appearances. We are accordingly of opinion that the trust deed was a fraudulent document intended as a cloak. On the basis of this trust deed the plaintiff cannot recover the property from Raja Jagat Kishore, for we are of opinion that one of the objects of the trust deed was to deprive Raja Jagat Kishore of his dues.

We are not impressed by the argument of Mr. Bose that the defendants cannot take by way of defence the plea that the trust deed was a fictitious deed, or a fraudulent deed executed with the intent of defeating or delaying the creditors. His argument is that such a case comes within the provisions of section 53 of the Transfer of Property Act. Under that section a document executed with

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that object is only a voidable one and Mr. Bose says that there were two ways open to Raja Jagat Kishore and his transferees namely either to institute a suit in a representative capacity for setting aside the deed or to express their intention of avoiding the deed before the suit. We do not think that this contention is sound.

The plaintiff seeks to recover possession of the property on the basis of the trust deed, Exhibit 1. That is her document of title. We think that the defendants are entitled to plead by way of defence the fact that the plaintiff should not be allowedt o recover on the basis of the said document as the document was a fraudulent one intended to defeat the rights of the creditor of which Raja Jagat Kishore was one. If the fraud is established, as we think that it has been established on the evidence, the plaintiff cannot ask for relief on the basis of the said document, for if relief is given to the plaintiff in spite of the fact that the document was a fraudulent one, this Court would only be assisting the fraud. It is one of the fundamental duties of the Court to prevent fraud being committed. On this principle we hold that the defence urged in this case was a defence which was open to Raja Jagat Kishore and his transferees.

We accordingly hold that the plaintiff cannot recover the property in suit from the defendants.

The result is that this appeal is allowed and the plaintiff's suit dismissed. As the plaintiff has sued in *forma pauperis* we direct the plaintiff to pay the amount of court-fees to the Government payable on the plaint. With regard to other costs, each party would bear their own costs throughout.

Let a copy of the decree of this Court be forwarded to the Collector of the district.

A. T. M. *Appeal allowed.*

Before Mr. Justice R. C. Mitter and Mr. Justice A. S. M. Akram.

SM. BHADRABATI DEBI

v.

JIBANMAL BABU AND OTHERS.*

AND

SM. BHADRABATI DEBI

v.

GIRINDRA NATH MITRA AND OTHERS.*

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July, 29. August, 6.

Receiver—Title to property, to whom vests—Civil Procedure Code (Act V of 1908), Order 40, rule 1—Partition suit - Parties, if can deal with their shares—Receiver, powers of—Court sanctioning loan by Receiver.

The title to property does not vest in the Receiver appointed in a partition suit under order 40, rule 1 of the Code of Civil Procedure, 1908, for the management and preservation of the property in suit and the parties have power to deal with their shares without reference to Court provided their acts do not interfere with possession of the Receiver. The Receiver can exercise the powers of the owner in the matter of execution of document and if the Court sanctions a loan on mortgage he can validly execute a mortgage instrument so as to bind the shares of owner.

In cases where the order of the Court simply sanctions a loan by the Receiver on a first charge of the properties, but does not indicate the purpose for which the loan is sanctioned, the creditor who advances the money is entitled to assume that everything was in order and so he ought to get what the Court had promised to give him namely precedence over earlier encumbrances created by the parties. In such a case the Court cannot break faith with him.

Where the purpose of the loan is for the protection or preservation of the properties committed to the care of the Receiver, the Court has power to sanction loan to be raised by the Receiver, and, if necessary, to direct the mortgage to be executed by him for securing it to have precedence over earlier mortgages executed by the parties. It may be unaware of such prior mortgages or even, if aware, may not give notice to those mortgagees. This power must be measured and limited by its duty, where its exercise comes into conflict with the rights of third parties which are not before it and to whom no notice had been given, or who had not consented. In such a case the principle of breach of faith cannot be the decisive factor. It is a question of power or jurisdiction of the Court. If the Court arrogates to itself a power which it does not possess—and such usurpation appears on the face of the order—and does an act affecting persons

* Appeals from Original Decrees Nos. 71 of 1937 and 6 of 1938, against the decrees of Babu Gobinda Chandra Chakravarty, Subordinate Judge of Burdwan, dated the 21st September, 1936, and 3rd August, 1937 respectively.

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not parties to the suit, its acts cannot prejudice the rights of such persons. In such a case the mortgagee from the Receiver cannot protect himself on the presumption that the Court had acted within its powers, for the order on the basis of which he acted *ex facie* would indicate want of power in the Court.

Appeal by Defendant No. 10.

Suit on mortgages.

The material facts appear from the judgment.

Dr. S. C. Basak, Messrs. Kamalaksha Basu, Atul Chandra Gupta and *Apurba Charan Mukherji* for the Appellant in No. 6.

Messrs. Atul Chandra Gupta and *Apurba Charan Mukherji* for the Appellant in No 71.

Mr. Rashbehari Mitra for the Respondent in No. 6.

Mr. Apurbadhan Mukherji for the Respondent in No. 71.

C. A. V.

The following judgment was delivered :

August, 6.

These two appeals are in two suits, Nos. 222 of 1935 and 1 of 1937 of the Court of the Subordinate Judge of Burdwan. The appeals were heard together by the consent of the parties. The first suit was filed by Jiban Mull and Dhanraj against ten defendants. In the suit they claimed to recover Rs. 57,748-4-0 by the enforcement of a mortgage executed in their favour on the 13th February, 1929, by defendants Nos. 1 to 6 and by defendant No. 8 on behalf of her ward defendant No. 7. Defendant No. 9 Mr. Nilmani Kumar Chatterjee is a receiver appointed by the Court in a suit (No. 142 of 1923 of the said Court) for partition between defendants Nos. 1 to 7, the sons of Rajendra Nath Dutt, and their co-sharers. Defendant No. 10 is Bhadrabati Debi, wife of Dinabandhu Tewari. The plaintiffs have impleaded her on the allegation that she was at best a puisne mortgagee in respect of some of the properties mortgaged to them. Defendants Nos. 1 to 7 of this suit will hereafter be designated as the heirs of Rajendra Nath Dutt.

The second suit was filed by Girindra Nath Mitter and others, the legal representatives of Mr. Debendra Nath Mitter, to recover Rs. 39, 999-15-1 by the enforcement of a mortgage executed by Anadi Nath Dutt on the 17th January, 1928, in favour of Debendra Nath Mitter. The defendants to the suit are (1) Anadi Nath Dutt, (2) Nilmony Kumar Chatterjee, the receiver appointed in the said suit for partition (No. 142 of 1923). The third defendant is Bhadrabati Debi. She was impleaded by the plaintiffs on the same footing as in the other suit. In both the suits

Bhadrabati Debi claims priority over the mortgages of the plaintiffs, though her mortgages are later in point of time. Her claim has been negatived by the same learned Subordinate Judge by his judgments dated the 28th September, 1936, and 3rd August, 1937. She has accordingly preferred these two appeals. The point is the same in both the appeals namely whether she is entitled to priority in respect of her mortgages. It arises on the same set of facts, which we now proceed to recite.

In 1923 Suit No. 142 of the Court of the Subordinate Judge at Burdwan was instituted for partition of the joint properties of the parties to that suit, who were Anadi Nath Dutt, the heirs of Rajendra Nath Dutt and Bibhuti Bhusan Dutt and others. In that suit Mr. Nilmony Kumar Chatterjee, a pleader, was appointed receiver on the 17th June, 1926. The two mortgages sought to be enforced in the two suits were executed after the appointment of the receiver.

It appears from the record that the said receiver was directed by the learned Subordinate Judge, who appointed him, to realise the arrears of rent of the properties committed to his charge that fell due before his appointment (that is before 1333 B. S.) but to keep those collections separate from the collection of arrears of rent which fell due after his appointment. This direction was given with a view to payment to the parties according to their shares of such moneys as would be collected by the receiver on account of arrears of rent for years prior to his appointment. The receiver, however, disregarded the directions of the Court. He mixed the two funds in a general account and spent the whole of it, it is said, for the benefit of the estate. On the 21st November, 1929, the parties moved the Court for a direction on the receiver to pay them according to their shares what had been collected from the tenants on account of those arrears. The receiver represented to Court that he had no funds from which he could satisfy the demand. The parties present thereupon asked the Court to authorise the receiver to raise a loan by mortgaging some joint property and to pay them from out of the money so raised. We will indicate hereafter in what way the receiver had a personal interest in that proposal. On the said application the Court recorded Order No. 596 on the same date. The order is not happily worded but the meaning of the said order is apparent. The Court suggested one of two alternatives: (1) either the raising of a loan at 12% on mortgage of some joint property or (2) raising the required sum by letting out in Darpatni some of the

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Khas lands. The Court however, expressly directed the receiver to let it know beforehand what property he proposed to mortgage. One would expect from the spirit of the order that the receiver was *first* to try the second alternative, and if that alternative failed *then* to raise a loan on mortgage but after informing the Court. It does not appear from the record that the receiver ever made any serious attempt to raise money by letting out in Darpartni some of the Khas lands. The evidence rather points out that he rushed to raise the loan without making any attempt to raise money by subletting Khas lands. In this order (Order No. 596) there was no indication that if the loan had to be raised the loan was to be a first charge on the property to be given as security. What the receiver did appears from what has been brought out in his cross-examination by the plaintiffs in suit No. 222 of 1935. He at once borrowed Rs. 11060 from Bhadrabati Debi on two promissory notes. This was in November or December 1929. He took the loan without further reference to Court. He justifies his action on the ground that he took the said loan on basis of order No. 596, dated the 21st November, 1929. We have already pointed out that the order did not justify such action on his part, for the Court made it clear that he was to inform it as to what property he proposed to mortgage before concluding the negotiations for loan. The reason for the great haste on his part to raise the loan appears from his cross-examination. His mother Sreemutty Krishna Kumari Debi had money lending business and she had lent money to the parties. He raised the money from Bhadrabati and paid out of the money so raised the money due to his mother from the parties. He is the only son of his mother and we cannot countenance his attempt to take shelter behind the thin screen of loss of memory. He says in his deposition given in suit No. 1 of 1937 that he assured Dinabandhu Tewary, the husband of Bhadrabati, that for the loan his wife would have priority and that if priority was not given to it by the Court the money advanced on the promissory notes would be refunded and it was on this assurance that Bhadrabati advanced the money. Even if he had misunderstood Order No. 596 and took it to mean that he was authorised straight away to raise a loan on mortgage without being required first to make an attempt to raise money by letting out khas lands in Darpatni there was no justification on his part to give that assurance. The unauthorised assurance was in our judgment given for the purpose of securing the money with the least delay so that his own mother may get satisfaction

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of her dues from the parties quickly. The aforesaid answer given by the receiver indicates that he had at least suspicion that there were prior charges created by the parties on their properties, for otherwise the question of priority of charge would not have entered his mind. He must have also disclosed at or before the time of the advance to Dinabandhu Tewary who was his friend and client the fact of the possibility of there being prior charges.

The matter of raising loan again came for consideration of the Court on the 11th January, 1930. On that date Anadi Nath Dutt and the heirs of Rajendra Nath Dutt suppressed from Court the fact that they had already mortgaged their shares of the joint properties including the Patni taluk in Chichuria, Touzi No. 12 of the Burdwan Collectorate. Some of the parties did not agree to the receiver raising money by mortgaging their shares but Anadi Nath Dutt and the heirs of Rajendra Nath Dutt consented to have their shares mortgaged. The Court by its order No. 603 passed on that date directed the receiver to mortgage separately the shares of Anadi Nath Dutt (1/12) and of the heirs of Rajendra Natd Dutt (1/3) and directed the receiver to pay Rs. 1600 to the former. This obviously meant that a loan of Rs. 1600 only was to be raised by mortgaging Anadi's 1/12 share in some property. The Court also directed the receiver to raise the moneys by mortgaging the shares of joint properties other than Patni Taluk Chichuria if that was possible. The parties, that is Anadi Nath Dutt and the heirs of Rajendra Nath Dutt, proposed that the mortgages by the receiver were to have precedence over other prior mortgages, and on the basis of the said proposal the order was made to the effect that the receiver's mortgages were to have precedence over other mortgages. The order was made in the absence of the plaintiffs and in ignorance of the fact that heavy amounts had been borrowed from them by Anadi Nath Dutt and the heirs of Rajendra Nath Dutt on mortgages. There cannot be any doubt on these facts that the Court was deliberately misled. But as no case of fraud was pleaded by the plaintiffs and there was no issue of fraud we leave the matter there. If such a case of fraud had been made possibly Bhadrabati could have answered it by showing that she or her husband was unaware of the device by which the Court was induced to make the order in that form. In pursuance of this order the receiver executed two mortgages in favour of Bhadrabati, one on the 31st January, 1930, by which he mortgaged 1/3 share belonging to the heirs of Rajendra Nath Dutt in Patni Taluk Lot Chichuria, in 4½ Bighas of land held

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in *makarari mourasi* right at a rental of Rs. 11-8-1 in Khas Bagan in the town of Burdwan (items Nos. 1 and 14 of the schedule to the plaint of suit No. 222 of 1935) and the other on the 6th May, 1930, by which he mortgaged the 1/12th share of Anadi Nath Dutt in Patni taluk Chichuria, the same share in some Chaukidari Chakran lands in that taluk and in Mehal Bhutagore (items Nos. 14, 27 and 31 of the schedule attached to the plaint of suit No. 1 of 1937). The last mentioned mortgage was for Rs. 5530 although the Court's order apparently was for raising a loan of Rs. 1600 only. The mortgages in favour of the plaintiffs included those properties as also other properties. Both the mortgages executed in favour of Bhadrabati recited the Court's orders Nos. 596 and 603 and stated that the said mortgages were to have precedence over other mortgages.

It is conceded by the parties that the mortgage in favour of the plaintiffs are valid notwithstanding the fact that the parties to the partition suit executed them after the appointment of the receiver without any reference to the Court. The title to the properties did not vest in the receiver, he being a receiver appointed under Order 40 of the Civil Procedure Code for the management and preservation of the properties in suit. The parties therefore had the power to deal with their shares without reference to Court provided that their acts did not interfere with possession of the receiver. The receiver could exercise the powers of the owners in the matter of execution of documents and if the Court sanctioned a loan on mortgage he could validly execute the mortgage instrument so as to bind the shares of the parties. These propositions have not and cannot be disputed, but the question is under what circumstances the Court appointing a receiver can direct a mortgage to be executed by him which is to have precedence over earlier mortgages executed by the parties. In considering this question we have to take into consideration the fact that sanctions for loan by receiver are generally given in the absence of such prior incumbrances and without notice to them. In most cases they have no knowledge of applications for loan, and in many cases the Court acts, as was in the case before us, without being apprised of such prior incumbrances. In these circumstances we think that a principle must be laid down which would not unduly infringe upon the rights of such third parties who had no notice of the application of the receiver to raise loan on first charge and who had no opportunity to present their case before the Court. We must also on the

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other hand take into consideration the position of the mortgagee who advances money to the receiver on the basis of the Court's order. Such a mortgagee is under a duty to see and usually sees the Court's order sanctioning the loan before he advances money. He is not bound to look beyond the order, In those cases where the order of the Court simply sanctions a loan by the receiver on a first charge of the properties, but does not indicate the purpose for which the loan is sanctioned, the creditor who advances the money is entitled to assume that every thing was in order and so he ought to get what the Court had promised to give him namely precedence over earlier encumbrances created by the parties. In such cases the Court cannot break faith with him. In cases, however, where the order itself recites the purpose of the loan, different consideration should, in our judgment, apply, and the observations which we make hereafter must be taken to apply to such cases only and not to those cases where the order is silent as to the purpose of the loan and is simply one sanctioning a loan on first charge. If the purpose of the loan as set out in the order is for preservation or protection of the property committed to the care of the receiver, or is an order in an administration suit or one in a partition suit made for working out the rights, liabilities and obligations of the co-sharers of the joint properties in the course of partition the mortgagee from the receiver would have first charge in accordance with the order. In the case where the purpose is the last mentioned one, the principle has been formulated in *Herumbo Nath Banerjee* v. *Satish Chandra Mukerjee* (1). Where the purpose of the loan is for the protection or preservation of the properties committed to the care of the receiver the principle seems to us to be this. By the appointment of the receiver the Court takes upon itself the duty of protecting and preserving the subject-matter of the suit, which it discharges through its own officer, namely the receiver. It must therefore have all powers which are incidental and necessary for the discharge of that duty. It will have therefore the power to sanction loan to be raised by the receiver, and if necessary, to direct the mortgage to be executed by him for securing it to have precedence over earlier mortgages executed by the parties. It may be unaware of such prior mortgages or even if aware may not give notice to those mortgagees. This in our judgment is the principle underlying the practice in such cases. In *Greenwood* v. *Algeries (Gibraltor) Railway Co.* (2) no reason was given but

(1) (1905) I. L. R. 33 Calc. 1175 (1176). (2) [1894] L. R. 2 Ch. 205.

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the judgment proceeded on established practice. All the cases cited at the Bar to illustrate the established practice were cases where the loan sanctioned on a first charge was for protection or preservation. This power of the Court being thus incidental to and necessary for the performance of its duty to protect and preserve the subject-matter of the suit, which it has taken upon itself by appointing a receiver, must be measured and limited by its duty, where its exercise comes into conflict with the rights of third parties which are not before it and to whom no notice had been given, or who had not consented. In such a case the principle of the breach of faith cannot, in our judgment, be the decisive factor. It is a question of power or jurisdiction of the Court. If the Court arrogates to itself a power which it does not possess,—and such usurpation appears on the face of the order,—and does an act affecting persons not parties to the suit, its acts cannot prejudice the rights of such persons. In such a case the mortgagee from the receiver cannot protect himself on the presumption that the Court had acted within its powers, for the order on the basis of which he acted *ex facie* would indicate want of power in the Court. The case of *Giridharilal Ray* v. *Dhirendra Kristo Mukerjee* (1) was a case where the purpose of the loan sanctioned was for the protection and preservation of the properties. The decision of the third Judge, Harington J., was based on two grounds namely.

(1) that the loan was taken by the receiver for the preservation of the property.

(2) that the order made therein was not a nullity and had not been set aside.

In our judgment if the first ground was the governing one the second ground followed from it. Harington, J. however, made an observation agreeing with Woodroffe, J.. that there would be breach of faith on the part of the Court if the mortgagee from the receiver be not given precedence but that observation must be read in our judgment with the facts of that case. In the case before us the order on the face of it indicated the purpose of the loan, which was not for the preservation or protection of the properties in suit. The proposed loan by the receiver was also not for the purpose of settling the rights, liabilities and obligations of the co-sharers of the joint properties in the course of partition. We have also indicated though the point is not material in the view we have taken, that Bhadrabati Debi did not advance the

(1) (1906) I. L. R. 34 Calc. 427; 4 C. L. J. 495.

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money on the faith of the order of the Court giving the receiver's mortgages precedence over prior mortgages, for she made the advance before Order No. 603 was passed.

We accordingly hold that the plaintiffs in both the suits have priority over the mortgages of Bhadrabati Debi.

We are informed that all the properties included in the mortgages of the plaintiffs and of Bhadrabati Debi have been sold, so no question of marshalling arises now. The appeals are dismissed, but in the circumstances without costs.

A. T. M. *Appeals dismissed.*

PRIVY COUNCIL.

PRESENT: *Lord Thankerton, Sir George Rankin and Sir Philip Macdonell.*

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SULEMAN HAJI AHMED UMER

v.

HAJI ABDULLA HAJI RAHIMTULLA.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY].

Limitation—Limitation Act (IX of 1908), Sch. I. Arts. 57, 59, 60—Deposit—Bailments.

Whether a claim is barred under the Limitation Act, 1908, depends upon the character of the bailment under which the plaintiff handed over and the defendant received the sums of money.

The course of dealing between the parties was that the defendant was acting very much as banker for the plaintiff. He received for safe custody whatever moneys the plaintiff wished to hand over to him; he paid those moneys to the plaintiff only when the latter asked him for them and he was not under any duty to 'seek out' the plaintiff to repay him:

Held, that a suit to recover various sums of money bailed by him to the defendant between the years 1923 to 1928 was governed by schedule I, Article 60 of the Limitation Act, 1908 and the period of limitation was three years commencing from the date when demand for these sums of money was made.

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Nawab Major Sir Mohammad Akbar Khan v. *Attar Singh* (1) applied.

Privy Council Appeal No. 47 of 1939, against the judgment and decree of the High Court of Bombay in its Appellate Jurisdiction given in favour of the plaintiff-respondent and reversing a judgment and decree of the Original Side of that Court dismissing the plaintiff's action.

The material facts appear from the judgment of their Lordships.

Sir T. Strangman K. C. and *R. K. Handoo* for the Appellant.

C. S. Rewcastle K. C. and *S. P. Khambatta* for the Respondent.

Their Lordships' judgment was delivered by

May, 23.

Sir Philip Macdonell: This is an appeal from a decision of the High Court of Bombay in its Appellate Jurisdiction, given in favour of the plaintiff-respondent, and reversing a judgment of the Original Side of that Court which judgment had dismissed the plaintiff-respondent's action to recover various sums of money bailed by him to the defendant-appellant between the years 1923 and 1928.

The only question for determination in this appeal is whether the respondent as plaintiff brought this action within time or whether his claim is barred under the Indian Limitation Act, No. IX of 1908, and the answer to this question depends on what was the character of the bailment under which the plaintiff handed over and the defendant received these sums of money. If by that bailment the respondent must claim these sums of money as "money payable for money lent," Article 57 of the Limitation Act, or as "money lent under an agreement that it shall be payable on demand," Article 59 of the Limitation Act, then and in each case the period of limitation would be three years commencing from the date when the loan was made, and the 14th April, 1932, when the present action was brought, will admittedly have been more than three years after the last of such loans was made, consequently the action would fail. If, however, by that bailment the respondent could claim these sums of money as "money deposited under an agreement that it shall be payable on demand, including money of a customer in the hands of his banker so payable," Article 60 of the Limitation Act, then the period of limitation would be three years commencing from the date when demand for these sums of money was made and this action was admittedly brought within three years after such demand

(1) (1936) L. R. 63 I. A. 279 (288); 63 C. L. J. 541 (548).

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by the respondent. The question has then to be determined whether he bailed these moneys to the appellant as a loan or as a deposit.

The authority ruling such a question is to be found in the judgment of the Board delivered by Lord Atkin in *Nawab Major Sir Mohammad Akbar Khan* v. *Attar Singh* (1), as follows :—

"Was this then a loan, or was it a deposit payable on damand ? It should be remembered that the two terms are not mutually exclusive. A deposit of money is not confined to a bailment of specific currency to be returned in specie. As in the case of a deposit with a banker it does not necessarily involve the creation of a trust, but may involve only the creation of the relation of debtor and creditor, a loan under conditions. The distinction which is perhaps the most obvious is that the deposit not for a fixed term does not seem to impose an immediate obligation on the depositee to seek out the depositor and repay him. He is to keep the money till asked for it. A demand by the depositor would, therefore, seem to be a normal condition of the obligation of the depositee to repay."

The trial Court concluded that the respondent handed these moneys to the appellant not as a deposit but as a loan, but founded this decision principally on its inability to accept the evidence of the respondent where in conflict with that of the appellant, and nowhere applied the test laid down in the case just cited, so as to ascertain whether on the admitted facts in the case there was an obligation on the appellant to "seek out" the respondent and repay him, or whether he was to keep the moneys till the respondent asked for them. The Appellate Court, however, held that on those admitted facts the respondent bailed these sums to the appellant as a deposit for safe custody, and their Lordships apprehend that this is the correct inference to draw from them.

The admitted material facts are these. The respondent lost his father in 1920 when of the age of 15. Thereafter he seems to have relied very much on the appellant and he married in 1922 a connection by marriage of the appellant. He had claims against certain firms of which his father had been a partner, and he made an agreement with the appellant that the latter should help him in litigation that might be necessary to enforce those claims, giving him a power of attorney for that purpose. The appellant did so help him, and under threat of action the partners of the respon-

(1) (1936) L. R. 63 I. A. 279 (288) ; 63 C. L. J. 541 (548).

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dent's deceased father paid up the sum of Rs. 1,30,000 in August, 1923. The appellant gives the story of what happened when this sum was paid, as follows :—

"I and plaintiff took the money to my father at the pedhi and he told us to credit the sum in the account of the appellant's firm."

"Under my father's instructions we put the money in the bank. . . . Plaintiff said to my father in my presence that the firm should keep the moneys at the pedhi but my father said that the amount was large and should be credited in the firm's account with the bank. So far as I remember nothing more was said by anyone."

The evidence shows that each other sum subsequently handed by the respondent to the appellant was treated in the same way, namely, handed to the appellant and placed by him in his bank account, and for the appellant it was conceded in argument that each of these subsequent moneys was handed over by the respondent and received by the appellant on the same terms as the Rs. 1,30,000. The appellant's evidence as to the bailment of that sum is strongly in favour of it being a deposit for safe custody and not a loan. The respondent and the appellant had numerous transactions during these years. The appellant had advanced sums to the respondent for maintenance and for litigation, and the respondent received sums of considerable size from rents of properties and from persons who had owed money to his father, and all of these he seems to have paid over to the appellant who put them into his bank account and credited them to the respondent. Whenever the appellant paid any of these moneys to the respondent, it was, according to the appellant's own evidence, because the respondent had asked for them. There is nothing in the evidence to suggest that the appellant ever "sought out" the respondent to repay him, it was always the respondent who made request of the appellant. The Appellate Court noted the total absence, on the admitted facts, of features one or more of which it would have expected to be present, had these bailments or any of them been a loan, the absence, namely, of any security for the alleged loans, of any receipt in writing, of any promissory note, or of any agreement as to what rate of interest the loan was to carry. If any one of these bailments had been a loan it would have been reasonable to expect it to be attended by one or other of these things. The course of dealing between the parties was that the appellant was acting very much as banker for the respon-

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dent, he received for safe custody whatever moneys the respondent wished to hand over to him, and he paid those moneys to the respondent only when the respondent asked him for them; there is no suggestion either in the appellant's evidence or in the unchallenged portion of the evidence of the respondent, that the appellant was under any duty to "seek out" the respondent to repay him.

On this view of the case it is unnecessary to consider the questions mainly discussed by the Court of trial, such as the significance of the appellant having destroyed the books of account which recorded these bailments, or the difficulty of believing the respondent where his evidence conflicted with that of the appellant; he may well have been an undependable witness even to the invention in places of false stories to get out of difficulties. The admitted facts bring the case within the test laid down in the judgment of the Board that has been quoted from. This was not a case disclosing any duty on the bailee of the moneys to seek out his bailor and repay him, but only a duty to repay if and when the bailor requested repayment. These bailments being deposits, the respondent brought his action within the time allowed by the Limitation Act, No. IX of 1908, and must succeed.

For these reasons their Lordships are of opinion that this appeal fails and must be dismissed, the respondent to have the costs of the same, and they will humbly advise His Majesty accordingly.

T. L. Wilson and Co.: Solicitors for the Appellant.

Barrow, Rogers & Nevill: Solicitors for the Respondent.

R. C. C. & A. T. M. *Appeal dismissed.*

PRESENT: *Lord Thankerton, Lord Justice Goddard and Mr. M. R. Jayakar.*

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May, 2.

THAKUR BHAGWAN SINGH AND OTHERS

v.

BISHAMBHAR NATH (MINOR) AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT ALLAHABAD.]

Burden of proof—Mortgage bond—Passing of consideration—Legal necessity.

The onus of proof on the question whether there was consideration or whether the full consideration stated in the mortgage had in fact passed, is wholly on the mortgagor and it is not for the mortgagee to prove this matter affirmatively; on the other hand when the question is whether there was legal necessity for the borrowing, the onus of proving that there was is on the mortgagee.

Privy Council Appeal No. 24 against the judgment and decree of the High Court of Allahabad dismissing an appeal by the present appellants and allowing an appeal by the first three respondents from a judgment of the Subordinate Judge of Agra.

C. Sidney Smith for the Appellants.

L. P. E. Pugh and *T. B. Wilson Ramsay* for the Respondents.

The judgment of their Lordships was delivered by

May, 2.

Lord Justice Goddard :—This is an appeal from a judgment of the High Court of Allahabad dismissing an appeal by the present appellants and allowing an appeal by the first three respondents from a judgment of the Subordinate Judge of Agra. The action was brought to recover Rs. 44,000 the principal sum secured by a mortgage, dated 17th August, 1924, with interest thereon at 5¼ per cent. This mortgage was in fact the last in a series by way of renewal of an original mortgage dated 22nd July, 1892, whereby Durjan Sal, the father of the first appellant and great grandfather of the 2nd and 3rd appellants, had mortgaged some of his ancestral lands to one Bhoraj the father of the 4th respondent, for Rs. 25,000. The consideration for the mortgage is stated in the deed to be the discharge of two promissory notes with interest amounting to Rs. 6,221-8-0 and Rs. 18,778-8-0 cash, for payment of a debt due under a bond. On the same day the mortgagor executed a bond for Rs. 2,000 payable in two years in favour of the mortgagee. This mortgage was renewed on 26th April, 1895, again on 29th July, 1910 and finally on 17th August, 1924 by the mortgagee which is the subject of the present suit. The execution and completion of

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the original mortgage and the receipt of Rs. 6,221-8-0 were admitted by the mortgagor in the presence of the Sub-Registrar, who certified that the cash payment of Rs. 18,778-8-0 and the two promissory notes were given to the mortgagor in his presence. Between August, 1912 and January, 1917, various payments, four in all, were made on account of interest due on the mortgage. On 30th September, 1932, the respondent Khetpal in whom the mortgage was then vested assigned all his rights therein to the father of the 1st and 3rd respondents.

Seven issues were framed, but for the purpose of the present appeal, only the first is material and was the only one argued, namely "Was the bond in suit executed for consideration and is it not binding on the defendants?" The case made for the defendants was that the original mortgage was not made for any legal necessity, but to procure money to enable the mortgagor to pursue a course of immoral living and debauchery, and that the true consideration was not Rs. 25,000 inasmuch as the promissory notes were merely fictitious documents, the sum of Rs. 6,200 never having been advanced at all, nor had the Rs. 2,000 ever been paid to the mortgagor. The Subordinate Judge found against the defendants on their plea as to there being no legal necessity for the borrowing, and his finding on that point was upheld by the High Court and is not now the subject of appeal. But the Subordinate Judge held that the sum of Rs. 6,221-8-0 never was advanced on the promissory notes and that there was no consideration for the bond for Rs. 2,000, and there was thus a failure of consideration to the extent of those two sums. He accordingly granted a decree for the amount of the principal and interest less these two sums, and, having recalculated the interest, he deducted in all Rs. 25,488. On this point the High Court reversed the learned Subordinate Judge and granted a decree for the full amount claimed.

Now there seems to have been some misunderstanding as to the onus of proof in this case. In their judgment the High Court said:—"We are of opinion that the burden of showing that consideration had passed under the mortgage of 1892 had been discharged by the plaintiffs and the defendants did not produce any satisfactory evidence to show that the money was returned to the mortgagee." But in the opinion of their Lordships the onus of proof on the question whether there was consideration, or whether the full consideration stated in the mortgage had in fact passed, is wholly on the defendants and it is not for the plaintiffs to prove this matter affirmatively; on the other hand when the question is

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whether there was legal necessity for the borrowing, the onus of proving that there was is on the plaintiffs. Now the only evidence that part of the consideration stated in the mortgage was not in fact paid, was that of a witness named Ganesh Prasad, a man, 73 years old, formerly in the service of the mortgagor, who stated that he had been present when the transaction was completed. In substance he deposed to three matters, firstly as to the immoral life of the mortgagor; secondly that the money which the Sub-Registrar certified was paid over to the mortgagor in his presence was never paid at all and thirdly that the Rs. 2,000 secured by the bond for that amount was produced in two bags and given by the Sub-Registrar to the mortgagor who did not keep it but returned it to the mortgagee. The learned Subordinate Judge rejected this witness's evidence on the first two matters to which he deposed and accepted it as to the Rs. 2,000. The High Court rejected this witness's evidence entirely and their Lordships do not think it necessary to add anything to the reasons they gave for so doing as it is obvious that no reliance could be placed upon it. So far as the fictitious character of the two promissory notes was concerned there was really no evidence of this at all, but the learned Subordinate Judge appears to have based his findings on certain circumstances which appeared to him suspicious and which need not be set out in detail because even if they gave rise to suspicion there was no evidence which would justify a finding that the sums secured by the notes had not in fact been paid. Ganesh Prasad's evidence having been rejected as untrustworthy there nothing was left in the case, and it was really unnecessary for the plaintiffs to have called any evidence on the issue as to consideration, for, as has already been pointed out, the burden of proof was entirely on the defendants. Not only did they wholly fail to discharge this onus, but the evidence which was called by the plaintiffs was indeed overwhelming. Had the defendants led any evidence sufficient to shift the onus of proof, that produced by the plaintiffs would, in their Lordships' opinion, have afforded a complete answer.

The 2nd appellant who was a minor when the suit was heard has presented a petition asking that the case might be remitted for rehearing. He bases his application on the ground that his guardian was negligent in failing to make proper inquiries into the facts of the case and to procure evidence to prove that a part of the money was borrowed for gambling in litigation, and for immoral purposes, in not taking steps in time to procure the

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examination of the 1st defendant and in failing to apply for a summons for the production of the mortgagee's account books. Both the petition and the affidavit in support are in the vaguest possible terms. There is not the smallest indication of the identity of the witnesses whom it is alleged might have been called, nor to what they could have deposed if they had been. The 1st defendant deliberately abstained from giving evidence and to pretend that it was the duty of the guardian to have forced him to testify is fantastic. Nor is there any substance in the complaint as to the mortgagee's account books more especially as during the case the defendant Khetpal who ought to have had them had there been any swore they were not in existence.

It is impossible to entertain an application for re-trial on such vague and unsubstantial grounds as these.

In the result their Lordships will humbly advise His Majesty that both the appeal and the petition should be dismissed. The appellants will pay the costs of the respondents Nos. 1 to 3 (plaintiffs), who alone appeared.

A. T. M. *Appeal dismissed.*

APPELLATE CIVIL.

Before Sir Harold Derbyshire, Knight, Chief Justice and Mr. Justice B. K. Mukherjea.

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July, 8.

JANANENDRA NARAYAN BAGCHI,
ON HIS DEATH HIS SONS
NIRENDRA NARAYAN BAGCHI AND OTHERS

v.

BHOLANATH MONDAL *alias* BHOLANATH ROY CHOWDHURY AND OTHERS.*

Decree, execution of—Adjustment—Civil Procedure Code (Act V of 1908), O. 21, R. 2—Deed of appointment of manager—One of the decree-holders and eleven annas judgment-debtors parties.

* Appeals from Original Orders Nos. 194 and 195 of 1938, against the orders of Babu Dinesh Chandra Sen, Subordinate Judge of Birbhum, dated the 21st March, 1938.

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One of the decree-holders, who has since died, was appointed a manager of the interest of the eleven annas judgment-debtors in the tenure. He was to manage the property on their behalf. There are detailed provisions in this deed of appointment—as to how the property was to be managed and how after meeting the collection expenses, paying out commissions to the manager and the current rent due in respect of the tenure, the surplus that remained were to be distributed. To this document the other decree-holders as well as the remaining judgment-debtors were no parties :

Held, that the document did not purport to be a deed of adjustment and the rent decrees obtained by all the decree-holders were not adjusted within the meaning of Order 21, rule 2 of the Code of Civil Procedure though it might have contained certain arrangements between the parties as regards the payment of decretal dues that were due under the rent decrees.

That the receipt of some portion of the rents that subsequently fell due by the other decree-holders did not make them parties to the instrument.

Appeal by the Decree-holders.

Applications for execution of rent decrees.

The material facts appear from the judgment.

Messrs. Jatindra Mohan Chowdhury and *Amarendra Narayan Bagchi* for the Appellants.

Messrs. Chandra Sekhar Sen, Hariprasanna Mukherji and *Monohar Chatterji* for the Respondents.

The following judgments were delivered :

July, 8.

Mukherjea, J. :—These two appeals arise out of certain proceedings in execution of two rent decrees which were obtained by the same decree-holders against the same judgment-debtors.

The rent suits were instituted in the year 1929 and decrees were obtained by the appellants decree-holders for sums of Rs. 9000 odd and Rs. 13,000 odd respectively.

In the present execution proccedings objections were raised by some of the judgment-debtors and these objections were of a two-fold character. In the first place it was contended that there was an arrangement between the decree-holders and the judgment-debtors which had the effect of an adjustment of the decree within the meaning of Order 21, rule 2 of the Code of Civil Procedure. In the second place it was argued that by reason of a compromise petition which was filed in this Court in connection with Appeal from Original Decree No. 178 of 1931, the decretal dues were payable in six yearly instalments and, consequently, the decree-holders were not entitled to take out execution for the whole amount. The executing Court has given effect to both these contentions urged on behalf of the judgment-

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debtors and has dismissed the applications for execution. It is against these two orders that these appeals have been preferred.

On hearing the learned Advocates on both sides we are of the opinion that the decision of the Court below is wrong and cannot be sustained. So far as the first point is concerned the case of the objecting judgment-debtors rests really upon a registered deed which is marked Ex. A in this case and which according to them embodies the terms of adjustment between the parties. The document has been read out to us by the learned Advocate appearing for the appellants. It purports to be a deed of appointment of a manager in respect of the share of the eleven annas judgment-debtors in the tenure in arrears

One Fakir Chandra Bagchi ,who was one of the decree-holders and has since died was, by this instrument, appointed a manager of the interest of the eleven annas judgment-debtors, and he was to manage the property on their behalf. There are detailed provisions in this deed of appointment—as to how the property was to be managed and how after meeting the collection expenses, paying out commissions to the manager and the current rents due in respect of the tenure, the surplus that remained were to be distributed. To this document the other decree-holders as well as the remaining judgment-debtors were no parties. It is conceded on behalf of the respondents that the other judgment-debtors who were no parties to this instrument could not possibly be bound by it. But it is argued that so far as the other decree-holders are concerned they having taken benefit under this instrument were estopped from disputing its validity.

As I have said above the document does not purport to be a deed of adjustment at all and says nothing from which we can infer that the decree was adjusted in any way within the meaning of Order 21, rule 2 of the Code of Civil Procedure. It may have contained certain arrangements between the parties as regards the payment of the decretal dues that were due under these two rent decrees, but from the simple fact that the other decree-holders were paid some portion of the rents that subsequently fell due we are unable to say that they became impliedly parties to the instrument and it could not be presumed that they expressly or impliedly authorised Fakir Chandra Bagchi to enter into any such agreement with the judgment-debtors on behalf of them all. That being the position we are of the opinion that Ex. A does not stand in the way of the decree-holders seeking to execute their decrees.

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As regards the other ground it appears that there was an appeal taken to this Court by the judgment-debtors not against the actual decision in the rent suits, but against certain observations made by the trial Judge as regards the way in which rents are to be paid in future. There was a compromise petition put in in this Court and one of the terms of the compromise was that the amount payable under the rent decrees would be paid off in six yearly instalments. It was also stated that the terms relating to the payment of the instalments mentioned above would be embodied in a separate petition to be filed in the execution proceedings in the Court of the Subordinate Judge at Suri.

It is admitted on both sides that no such separate petition was filed before the executing Court and we do not know the terms according to which these instalments were to be paid. It appears from the records that this objection was taken in an earlier execution proceeding, but it was over-ruled by the executing Court. The decree-holders have mentioned this petition of compromise in their application for execution and have stated also that no instalment had been paid in accordance with the same.

Under these circumstances we are of the opinion that there was no concluded agreement between the parties as regards the payment of the decretal dues by instalments and if as a matter of fact none of the instalments were paid by the judgment-debtors, the decree-holders are at liberty to execute the decree. The learned Advocates who appear on behalf of the respondents also do not press this point.

The result, therefore, is that the appeals are allowed, the order passed by the executing Court in both the miscellaneous proceedings are set aside and the cases are remitted to the executing Court in order that the decree-holders might be allowed to proceed with the execution of the decrees.

It has been brought to our notice by Mr. Hariprasanna Mukherjee who appears on behalf of the eleven annas judgment-debtors that the account books filed by Fakir Chandra Bagchi have actually been produced before the Court and on a proper investigation of these accounts it will be found that a considerable sum of money has been paid on their behalf. The executing Court will certainly go into these accounts and will give credit to the judgment-debtors for any sums that might have been paid on their behalf as disclosed by these accounts.

Respondent No. 9Ka, Tarak Brahma Roy, is represented in this Court by Mr. Chandra Sekhar Sen. We are of the opinion

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that as he was a purchasar of an eight annas share of the Mahal, pending the hearing of the rent suits he is not personally liable for any amount of the rent; and if the *putni* and the *dar-putni* have already been sold at the instance of the superior landlord, he cannot be made personally liable.

The appeals are, therefore, allowed and the cases remitted to the Court below to be dealt with according to law. The appellants are entitled to their costs in these appeals—the hearing-fee being assessed at one gold mohur in each appeal.

Derbyshire, C. J.:—I agree.

A. T. M. *Appeal allowed: Cases remanded.*

Before Mr. Justice R. C. Mitter and Mr. Justice T. J. Y. Roxburgh.

KUNJA BEHARI CHAKRABARTY

v.

KRISHNADHAN MAJUMDAR.*

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April, 29, 30. May, 2, 31.

Decree—Suit to set aside—Perjured evidence—Fraud, allegation of—Judgment on false claim.

A decree cannot be reopened on the ground that it has been obtained by perjured evidence.

Mahomed Golab v. *Mahomed Sulliman* (1) followed.

Lakshmi Charan Saha v. *Nur Ali* (2) commented on.

To sustain an action for setting aside a decree the fraud alleged and proved must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and obtaining that decree by that contrivance.

Abdul Huq v. *Abdul Hafez* (3) and *Nanda Kumar Howladar* v. *Ram Jiban Howladar* (4) referred to.

*Appeal from Original Decree No. 51 of 1940, against the decree of Rabindra Kumar Basu Esq., Subordinate Judge, 1st Court of Howrah, dated the 7th February, 1940.

(1) (1894) I. L. R. 21 Calc. 612.
(2) (1911) I. L. R. 38 Calc. 936.
(3) (1910) 14 C. W. N. 695.
(4) (1914) I. L. R. 41 Calc. 990; 18 C. W. N. 681; 19 C. L. J. 457.

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A domestic judgment cannot be reopened where the only allegation of fraud made by the plaintiff of the late action is that judgment had been given on false claim. In a case of domestic judgment falsity of the claim may be one of the material facts only in a limited class of cases, namely, where the judgment was an *ex parte* one where no summons had been served and the direct proof falls short of actual suppression of summons.

Kedar Nath Das v. *Hemanta Kumari Debi* (1) and *Manindra Nath Mitter* v. *Hari Mondal* (2) dissented from.

Appeal by the Plaintiff.

Suit to set aside a decree on the ground of fraud.

The material facts appear from the judgment.

Messrs. Rama Prosad Mookerjee, Gour Mohan Dutta, Gopendra Krishna Benerji and *Satya Chandra Pain* for the Appellant.

Messrs. Chandra Sekhar Sen and *Sushil Chandra Dutta* for the Respondent.

C. A. V.

The following judgment was delivered :

May, 31. This appeal is in a suit instituted by the appellant Kunja on the 15th March, 1938, in the first Court of the Subordinate Judge at Howrah to set aside on the ground of fraud a decree passed by this Court in its Ordinary Original Jurisdiction. The question in this appeal is whether the suit is maintainable on the allegations made in the plaint and on the facts either admitted or conclusively proved.

The respondent Krishnadhan brought suit No. 1209 of 1930 against the appellant in the Original Side of this Court for recovery of the sum of Rs. 7068-9-6 due on a promissory note said to have been executed at Calcutta on the 30th June, 1927, by the latter in his favour. The promissory note was filed with the plaint but was taken back by his Solicitors Messrs O. C. Ganguly & Co. after keeping on the record an authenticated copy. At the time of the hearing of the suit the original promissory note was not before the Court.

After entering appearance in that suit the appellant asked the respondent's Solicitors to give him inspection of the original promissory note. That request was not complied with, the said Solicitor taking up the position that it had been mislaid in his office after it had been taken back by him from Court. The appellant eventually filed a Chamber application in December

(1) (1913) 18 C. W. N. 447. (2) (1919) 24 C. W. N. 133.

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1930, in which he brought to the notice of the Court the fact that he could not get inspection of the original promissory note. He asked for an order on the respondent to produce it for inspection within a definite time and for dismissal of the suit in case it was not produced within the time limited by the Court. This application was moved on the basis of an affidavit affirmed by him on the 16th December, 1930.

Probodh Chandra Ghose, the Court Clerk and Birendra Coomar Ganguly, the cashier and record keeper of the respondent's Solicitors filed a joint affidavit in answer on the 18th December, 1930. In that affidavit, the former stated that the original promissory note had been filed with the plaint before the Master and that in the usual course of practice it was taken back and kept in an almirah in the Solicitor's Office. The latter affirmed that he himself had kept it there in the course of his duty. They both affirmed that since the requisitions for inspection from the appellant they had been making diligent searches for it but without success.

In answer to this affidavit the appellant filed another affidavit affirmed by him on the 5th January, 1931. In it he made a definite case that the promissory note was a forged one and that it was being suppressed by the respondent to prevent detection of the forgery on the false plea that it was missing. On these materials that Chamber application was moved on the 13th January, 1931. A consent order was passed on that date. The prayers for production of the promisssory note and for the dismissal of the suit in case it was not produced were not allowed, on the respondent undertaking to file an affidavit swearing to its loss and to file his account books which were then in the custody of the Criminal Court at Howrah. The respondent fulfilled these undertakings later on.

The appellant having got leave to defend the suit filed his written statement on the 24th February, 1931. He denied having executed the promissory note and suggested that it and another document, a letter evidencing deposit of title deeds marked later on as Exht. N in that suit, had been forged on two blank sheets of paper containing his signature, such papers having in the past been delivered by him to the respondent for being used in legal proceedings.

At the trial before Ameer Ali, J the appellant pressed his case that the suit had been brought on a forged promissory note, and for supporting the said case contended that the original promis-

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sory note had been fraudulently suppressed. Evidence was led by respondent to meet the last mentioned contention. He examined Probodh Chanbra Ghose, Birendra Coomar Ganguly and Mr. Ordhendu Coomar Ganguly, a partner of Messrs O. C. Ganguly & Co. to prove that the original promissory note had not been suppressed but had in fact been lost from the Solicitor's Office after it had been filed with the plaint and taken back from Court. In support of his case of forgery the appellant examined himself, Becharam Chatterjee and Tridev Chandra Chatterjee. They said that on the date of the promissory note in question the appellant was at Benares where he stayed up to the 30th June, 1927, and returned to Howrah in July 1927. Tridev produced his diary in support of his testimony. This diary was marked an exhibit in the case.

On those materials and on others including the letter Ex. N Ameer Ali, J. decreed the suit on the 17th August, 1933. In decreeing the suit he took into consideration Kunja's case of the alleged suppression by Krishnadhan of the original promissory note.

Kunja preferred an appeal against the judgment of Ameer Ali, J. That appeal was heard by Costello and Lort-Williams, JJ. who dismissed the same on the 30th July, 1934. After delivery of their judgment but before it was signed, some anonymous letters reached the said learned Judges, which contained statements to the effect that the said promissory note and the letter Ex. N on which the learned Judges had mainly relied upon in dismissing the said appeal were forgeries. The learned Judges put off signing their judgment and gave him (Kunja) an opportunity to prosecute enquiries and to place further materials before the Court within a month. He later on filed an application in which he gave particulars of the forgery of the promissory note and of Ex. N. An affidavit sworn by one Bhujendra Nath Sen, a former clerk in the office of Messers O. C. Ganguly & Co. who had previously sworn to an affidavit to the effect that the promissory note had been received by him from Krishnadhan and had been mislaid in the Solicitor's office, was made an annexure. In this affidavit Bhujendra stated that the promissory note and Ex. N had been forged, that Krishnadhan had admitted before him in detail how and when they were forged and that he himself was an accomplice of Krishnadhan in the matter of the suppression of the original promisiory note. This application was refused on the ground that it was filed beyond the time granted and the judgment was signed. Kunja thereafter filed an application for review

on the ground that he had discovered new and important evidence which would show that the promissory note and Ex. N had been forged. The additional evidence which was attempted to be introduced was to be the evidence of the self same man Bhujendra. This application for review was rejected in 1939. The learned Judges in rejecting the application for review observed that if the additional evidence intended to be produced was *prima facie* credible they would have granted the application for review and would have afforded Kunja an opportunity to place that evidence at the new trial. But as Bhujendra was a self-convicted perjurer those testimony could not be relied upon, they refused to admit the application for review.

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When the decree so passed by this Court was sought to be executed in the Court of the Subordinate Judge at Howrah, Kunja filed this suit, in which this appeal arises, in that Court in the year 1938. The principal point is whether the suit is at all maintainable. As we hold in agreement with the learned Subordinate Judge that it is not, we do not enter into other questions canvassed before him. In fact we did not hear any of the parties on the other questions. For deciding the question of the maintainability of the suit the plaint will have to be examined in some detail, keeping in view the facts which we have recited above and about which there cannot be any possible dispute.

In the plaint the plaintiff admits that his case in the suit brought to enforce the promissory note was that the latter was a rank forgery and that he had led evidence to prove that it was so. He admits that this Court granted a decree in favour of the defendant, though the promissory note was not produced on a false plea that it was missing. After making this statement he makes the general allegation that this Court was "misled by the fraud of the defendant." The averment thus made only amounts to the fact that Krishnadhan had managed to get a decree on a false claim by producing perjured evidence. This is all that is contained in paragraph 9 of the plaint. In paragraphs 10 and 11 he states that after the judgment of Costello and Lort Williams, JJ. he started enquiries, after the anonymous letters received by the said learned Judges had been shown to his Solicitor by the Registrar of this Court, and as a result of those enquiries he got definite information regarding the fraud from Bhujendra who gave him a signed statement. The information given by Bhujendra was what was embodied in the affidavit of Bhujendra which the learned

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Judges had before them when the application for review was moved and on which they commented in their order.

In paragraph 13 he specifies the heads of fraud which according to him entitled him to re-open in the suit the final decree passed against him. At the end of sub-paragraph (i) he makes the statement that "there was a pre-meditated contrivance whereby the defendant in conspiracy with Bhujendra and others managed to keep the plaintiff and the Court in ignorance of the real facts of the case and obtained a decree by that contrivance." What this "conspiracy" and "contrivance" were are indicated in the sub-paragraph of the said paragraph. A summary of the said sub-paragraphs can be made as follows :—

In 1927 Krishnadhan became displeased with him and formed the idea of putting him in trouble. In that year he called in his aid the services of a forgerer and had his signature forged on two blank sheets of paper. Bhujendra was thereafter prevailed upon by him to type on those two sheets the body of the promissory note and of the letter of deposit of title deeds (Ex. N). The promissory note was filed with the plaint but was taken back and was suppressed on a false plea that it had been mislaid thereafter, the object being that if it had been produced in Court the forgery would have been discovered at once. By reason of the false affidavits filed in the suit suspicions that would have otherwise arisen from the non-production at the hearing of the original promissory note were allayed and his Solicitor and Counsel were "thoroughly deceived," the Court was intentionally misled on the wrong track and was induced to pass a decree on the basis of the admission contained in the fabricated letter of deposit (Ex. N). Bhujendra's mouth was shut by reason of an affidavit which the defendant caused him to swear and file in Court. The defendant thus got a decree on a false claim known to him to be false by leading false evidence. The evidence in support of his case was led on three points namely.

(1) that Krishnadhan had asked Kunja to depose falsely for him in a case and on his refusal there was a heated discussion.

(2) that the promissory note was forged and that Krishnadhan and Bhujendra admitted the forgery in the presence of some of the clerks in the office of Messrs. O. C. Ganguly & Co.

(3) that the story of the loss of the original promissory note was a myth, Krishnadhan's son having taken it from the Solicitor's Office after it had been taken back from Court.

The evidence so produced by the appellant had been disbelieved

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by the learned Subordinate Judge. As we are dismissing the appeal on the ground that the suit is not maintainable we do not discuss the value to be attached to this evidence, but we simply mention them for the purpose of indicating what was the nature of the fraud which according to the appellant had been committed by the respondent on him and on the Court which had "misled" the Court in passing the decree. As we have already remarked, his allegations in the plaint that by a "pre-meditated contrivance" of the defendant he and the Court which passed the decree were kept in ignorance of the real facts has no other meaning and the sum and substance of his case is that

(a) the claim of the defendant was false and false to his knowledge,

(b) it was decreed on perjured evidence,

(c) the original promissory note was intentionally suppressed on a false plea, and

(d) that he is now in better position to substantiate the first three points as he has since the decree passed by this Court discovered more evidence.

We do not think that he can re-open the decree on any one of these grounds. The first three grounds were urged by him in resisting the suit for enforcing the promissory note. They were agitated and decided against him. No new fraud has been pleaded. The discovery of more evidence was made the ground for the application for review but that application was also refused. We agree with the view of the learned Subordinate Judge that all that is sought by the appellant in this suit is "to consolidate the grounds taken by him in the previous trial by new and fresh materials and that "the whole gamut of contentions unsuccessfully advanced by him in the previous trial to repel the defendant's claim on the promissory note has been made the basis of the so-called fraud for avoiding the decree." This is the special aspect of this case which distinguishes it from many of the cases placed before us by the appellant's Advocate, Mr. Mookerjee.

It is now well settled that a decree cannot be re-opened on the ground that it has been obtained by purjured evidence. In *Mahomed Golab* v. *Mahomed Sulliman* (1) Sir Comer Petheram C. J. laid down that proposition and pointed out that if the law was otherwise there would be no finality to litigation. In *Lakshmi Charan Saha* v. *Nur Ali* (2) however, the observation of Petheram

(1) (1894) I. L. R. 21 Calc. 612.
(2) (1911) I. L. R. 38 Calc. 936.

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C. J. in *Mahomed Golab's* case (1) was discarded on the ground that it was *obiter*, the learned Judges proceeding further to observe that in the light of later decisions of the English Courts it cannot be said that the law was laid down correctly by Petheram, C. J. The reasoning adopted and the English decisions relied on there were subjected to critical analysis in *Munshi Mosuful Huq* v. *Surendra Nath Ray* (2) and Petheram C. J's dictum was followed. The later cases of this Court have all along accepted the dictum of Petheram C. J. as sound and have either criticised or distinguished *Lakshmi Charan's* case (3). A useful review of the case law is given in *Muktamala* v. *Ram Chandra* (4). The proposition is well settled that a decree can be re-opened by a new action when the Court passing it had been misled by fraud but it cannot be re-opened when the Court is simply mistaken; when the decree was passed by relying upon perjured evidence, it cannot be said that the Court was misled. (Kerr on Fraud and Mistake p. 425, 6th edition). To us it seems that to sustain an action for setting aside a decree the fraud alleged and proved must be "actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and obtaining that decree by that contrivance". This is the view adopted by Casperz and Doss JJ. in *Abdul Huq* v. *Abdul Hafez* (5) and by Jenkins C. J. and N. R. Chatterjea J. in *Nanda Kumar Howladar* v. *Ram Jiban Howladar* (6). It is not possible to enumerate all the circumstances which would lead a Court to come to the conclusion that there was such a contrivance. In the case of ex parte decrees when the defendant had never appeared the contrivance may consist in suppressing the summons. The fact of suppression would itself be the contrivance, and indeed a most effective contrivance for keeping the defendant in ignorance of his rights and from placing his case before the Court. Mere non-service would not do. But when the fact of non-service of summons is proved by the plaintiff in the later action, and the claim on which the decree was passed is proved to be a false one, the Court may and should ordinarily infer deliberate and hence fraudulent suppression, for the last mentioned circumstance supplies the motive for the suppression and indicates that the suppression is itself

(1) (1894) I. L. R. 21 Calc. 612. (2) (1912) 16 C. W. N. 1002.
(3) (1911) I. L. R. 38 Calc. 936. (4) (1926) 31 C. W. N. 258.
(5) (1910) 14 C. W. N. 695.
(6) (1914) I. L. R. 41 Calc. 990, 18 C. W. N. 681; 19 C. L. J. 457.

fraudulent [*Ram Chandra Prasad* v. *Firm Parbhu Lal Ramratan* (1)]. The case of *Pran Nath Ray* v. *Mohesh Chandra Moitra* (2) which was affirmed on appeal by the Judicial Committee of the Privy Council *(subnomine) Radha Raman Shaha* v. *Pran Nath Roy* (3) is of this type. The actual decision in *Lakshmi Charan's* case (4) can be supported on this principle. In such cases the fact that the question of non-service of summons had been adjudicated in an earlier proceeding under Order 9, rule 13 of the Civil Procedure Code would not bar the investigation of fraud, as the issues would not be the same: *Radha Raman Shaha* v. *Pran Nath Roy* (3). The facts which would constitute the fraudulent contrivance would not necessarily be the same in the case of contested decrees, or ex parte decrees where the plaintiff in the later action had appeared in the earlier suit at the same stage. The fraud must be one extraneous to the suit which terminated in the decree. The case of *Khagendra Nath Moitra* v. *Pran Nath Roy* (5) illustrates the nature of such contrivance. There the defendant in the original suit was prevented from placing his case by a false lunacy proceeding against him by threats which compelled him to leave his home and to hide himself.

The learned Advocate for the appellant has also contended before us that there is another broad head which would entitle the plaintiff in the later action to set aside a decree against him whether passed *ex parte* or on contest. He says that if the decree was passed on a *false* claim *known* to be *false* by the plaintiff in the original action, it has to be set aside. For this proposition he has relied upon *Kedar Nath Das* v. *Hemanta Kumari Debi* (6) and on the observation in *Manindra Nath Mitter* v. *Hari Mondal* (7), where an attempt was made to reconcile the decisions of this Court on the basis of the decision in *Kedar Nath's* case (6). The decision in *Kedar Nath's* case (6) was based on the decision in *Abouloff* v. *Oppenheimer* (8) and *Vadala* v. *Lawes* (9). Those two cases will have therefore to be examined in some detail.

(1) (1927) I. L. R. 6 Pat. 458.
(2) (1897) I. L. R. 24 Calc. 546.
(3) (1901) I. L. R. 28 Calc. 475.
(4) (1911) I. L. R. 38 Calc. 936.
(5) (1902) L. R. 29 I. A. 99; I. L. R. 29 Calc. 395.
(6) (1913) 18 C. W. N. 447.
(7) (1919) 24 C. W. N. 133.
(8) (1882) L. R. 10 Q. B. D. 295.
(9) (1890) L. R. 25 Q. B. D. 310.

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In none of those cases was any stress laid on the fact of knowledge of the decree-holder that his claim, which in fact was a false one, was false, but the facts imply that if the claim was false it was known to him to be so. Both those cases related to the foreign judgments. Suits were instituted in England to enforce the judgment of a Russian Court in one case and of an Italian Court in the other. The defence was that those judgments could not be enforced in an English Court, because they had been obtained by fraud of the plaintiff. The question considered was whether for the purpose of deciding the question of fraud the merits could be re-opened. The matter was put in clear terms by Lindley, L. J. in *Vadala* v. *Lawes* (1). He stated that there were two principles. The first was that a party to an action can impeach a judgment on the ground of fraud, whether the judgment impeached was a domestic or a foreign judgment. The second principle stated in general terms was that in an action to enforce a foreign judgment in an English Court, the English Court cannot go into the merits which had been tried in the foreign Court. This last mentioned proposition is a corollary from the proposition that the English Court regard the foreign judgment as creating an obligation. After stating the two principles Lindley, L. J. then proceeded to observe that the two rules had to be combined when the foreign judgment was impeached on the ground of fraud. When the case of fraud cannot be determined without re-opening the merits, the merits can be re-opened in an English Court. " You can re-open the whole case even although you will have in this Court to go into the very facts which were investigated and which were *in issue* in the foreign Court." He did not place any importance on the technical answer that the issue in the English Court was not the issue in the foreign Court. He quoted with approval the observations in *Abouloff's* case (2) to the effect that even if the selfsame case of fraud had been investigated by the foreign Court and had been negatived on the basis of false evidence adduced in that Court, still the English Court could go into the matter again to see the circumstances under which that judgment was given. The law thus formulated as applicable to foreign judgments is wider in terms than what would be applicable to domestic judgments; for a domestic judgment cannot be attacked simply because it was obtained by false evidence, and direct issue already decided cannot be re-agitated on the principle of

(1) (1890) L. R 25 Q. B. D. 310 (316).
(2) (1882) L. R. 10 Q. B. D. 295.

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res judicata. As a foreign judgment is regarded in England not *qua* judgment but only as a jural act by which an independent obligation is created, the rule of *res judicata* cannot be invoked in the case of a foreign judgment. This fact in our judgment distinguishes a foreign judgment from a domestic one and would accordingly prevent a Court from re-opening in a later action a domestic judgment where the fraud alleged was directly and substantially in issue in the former suit and been enquired into and repelled. We are accordingly of opinion that a domestic judgment cannot be re-opened where the *only* allegation of fraud made by the plainiff of the late action is that judgment had been given on a false claim. That allegation in substance means that the former adjudication was wrong, the Court determining on perjured evidence the claim as true which was in fact a false one. The principle applicable in the domestic *forum* would then have no meaning. In the case of a domestic judgment falsity of the claim, in our judgment, may be one of the material facts only in a limited classses of cases, namely where the judgment was an *ex parte* one where no summons had been served and the direct proof falls short of actual suppression of summons. We do not accordingly agree with the view expressed in *Kedar Nath Das* v. *Hemanta Kumari Debi* (1), simply because the claim on which the former judgment had been passed in a domestic tribunal was a false one known to the decree-holder to be false, the former judgment was to be set aside. The actual decision in that case can however be justified.

The decree passed in that suit was an *ex parte* one. The plaintiff, Hemanta Kumari Debi, in the later action alleged that summons of the former suit had been fraudulently suppressed. That was the fraud alleged. She proved that the summons had not been served. At least the lower Court found that there was no satisfactory proof of service of summons on her. In those circumstances falsity of the claim could be investigated in the later suit. If the claim on which the *ex parte* decree was passed was a false one, that would have furnished the *motive* for the suppression of summons, and from the said fact combined with the fact of non-service of summons the Court could have inferred that the summons had in fact been suppressed. For the same reason we are unable to agree with the distinction sought to be made in the case of *Manindra Nath Mitter* v. *Hari Mondal* (2).

(1) (1913) 18 C. W. N. 447.
(2) (1919) 24 C. W. N. 133.

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In the case before us the question whether the promissory note was a false one was adjudicated upon in the suit on the promissory note. The question whether it had been suppressed on a false plea was also considered. An application for review of judgment which sought to introduce further evidence of a nature like the evidence led in this case was made. The correct procedure and the only procedure for leading additional evidence was adopted. The rejection of the application for review has given finality to this attempt. The judgment in *Munshi Mosuful Huq* v. *Surendra Nath Ray* (1) in our judgment gives the correct interpretation of the law on the subject of production of additional evidence in cases of this kind.

We accordingly hold that the suit is not maintainable and the appeal must be dismissed with costs.

The connected application is also dismissed.

A. T. M. *Appeal dismissed.*

(1) (1913) 16 C. W. N. 1002

ORIGINAL CIVIL.

Before Mr. Justice T. Ameer Ali.

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June, 25.

JHAJHARIA BROS. LTD.

v.

THE SHOLAPUR SPINNING AND WEAVING CO. LTD.*

Party—Suits, different kinds of, against company—'Fraud upon the minority'—Wrong-doer—Balance of power—Courses open—Wrong-doers, share-holders—'Except those who are defendants'—Absence of defendant—Defect of form—Primary fraud—Directors, when to be parties.

There can be suit by share-holders against the company for individual wrong done to them. Apart from individual wrong there may be suits to restrain acts *ultra vires*. The Court interferes in cases of *ultra vires* acts, because they are not within the constitution.

Cases of 'fraud upon the minority' are only special examples of an action by the company for what is in theory regarded as a wrong done to the company; a special form of the suit being adopted as a matter of machinery to obtain a relief under special and peculiar circumstances.

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If the wrong-doer has the balance of power, and therefore the company does not take action, there are two courses open. The minority may take the risk and boldly use the company's name. The other course, where the wrongful act is supported by the majority, is for the minority share-holders to sue in their own name or, as a matter of convenience, for a share-holder to sue on behalf of himself and all the other share-holders. If the wrong-doers are also share-holders, these share-holders as a matter of course must be excluded from the category of the plaintiffs ; hence the phrase 'except those who are defendants'.

In a suit so brought, the complaint is said to be of a 'fraud on the minority'. The real significance of it is that it was a violation of the constitution, so to speak, the rights, in other words, of all share-holders who are all citizens. It is really a suit by the company against the wrong-doers to company.

In order to provide a process, the law regards the company for the purposes of the suit as split up into its units.

Absence of any defendant other than the company is not a defect merely of form.

The primary fraud must be clearly indicated. It is the gist of the action.

It might be sufficient to make the wrong-doers parties *qua* share-holders, although if the primary wrong be as it is that of the directors, it is right and proper they should be sued *qua* directors.

Where a decision of the directors is attacked on the ground that it is injurious to the company, the directors should be parties. Where that act of the directors so impeached has been confirmed and is still impeached on the basis that the directors have got that confirmation by controlling the majority, still those directors should be parties.

The directors might be assailed if it is established first that the increase of capital is for the purpose of power ; secondly, that the passing of the company resolution confirming the increase was procured by their own power, by the power of their dependants or by any kind of device.

Suit by a Private Company.

The facts are stated in the judgment.

Messrs. S. M. Bose, B. C. Ghose and *H. N. Sanyal* for the Plaintiffs.

Messrs. S. N. Banerjee (Sr), K. P. Khaitan, B. N. Dutt Ray and *Clough* for the Defendants.

The following judgment was delivered :

June 25.

The defendant company was formed as long ago as 1874 with a capital of eight lakhs divided approximately into 800 shares. Since that date it has had its ups and downs, but it has spun and woven. It has made its profits. It has turned out goods, and no doubt if its management would devote its attention more

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exclusively to spinning and weaving it would be a flourishing industrial concern.

Among the downs, may be mentioned the winding up petition of 1930, which ultimately resulted in borrowing some seventy lakhs upon debentures.

In 1931 largely I gather as the result of the need for finance managing agents were obtained in the shape of the Jhajharia and Dhandania families, who combining into the unit of Morarji Goculdas & Co. became for a period the managing agents. If I recollect rightly, the Jhajharias became selling agents under an agreement, the term of which was 20 years. The managing agents under their agreement became liable for advances to the extent of 20 lakhs in two stages. These advances were secured by the company by hypothecating its stock and by depositing debentures of a certain aggregate value. The actual management of the company was carried on by Ramdhonedas Jhajharia, who gave evidence before me.

In January, 1933, the managing agents were dismissed. Of the directors who took that action only one survives, Mr. Cama. This breach between Jhajharias and the company led to a series of suits: a suit by one of the Jhajharia family impugning the act of of the directors; a suit by Morarji Goculdas & Co. for damages and for specific performance of the managing agency agreement; a suit by the Jhajharias in respect of certain debentures relating to their loan; and lastly to certain disputes between the Jhajharias as selling agents and the company, which were submitted to arbitration. The selling agency dispute seems to have dragged on indefinitely. In the suits the Jhajharia interest with the exception of the debenture suit seems to have been uniformly unsuccessful, subject to this that the managing agents' suit is still under appeal to the Judicial Committee.

For the period 1933 to 1937 there were no managing agents.

In February 1937 again coupled with arrangements for further advances, this time to the extent of 12 lakhs, the Murarkas were appointed managing agents, and the trouble already indicated became more acute.

The Jhajharias before August 1938 had acquired some 255 shares. They represented what might be called the opposition; in particular, they were demanding some form of enquiry into the management of the company.

On August 31, 1938, there was a company meeting, which has been the subject matter of conflicting evidence; rather the

circumstances surrounding that meeting have been the subject-matter of conflicting stories. The plaintiffs' case, generally speaking, is that the incidents of this meeting and those surrounding it contained a successful attempt to buy over or dispose of the opposition. To this incident and its implications I may have again to refer. In February 1939 the selling agency was terminated, according to the Jhajharias, wrongfully. This matter was also referred to arbitration.

Apparently the company claimed against the Jhajharias considerable sums alleged to be due from them in their capacity as selling agents, and in pursuance of this claim the company or the directors purported to declare a lien over a large proportion of Jhajharia's shares, I think 211 shares.

Shortly after this, at any rate before the end of 1939, the Murarkas caused themselves to be registered as owners in respect of 163 shares out of the 265 originally acquired by Jhajharias. The Murarkas claimed to obtain these by purchase; the Jhajharias claimed that the Murarkas were no more at the highest then sub-pledgees, the intermediate pledgees being the Dalmias.

In January, 1940 a tender was made in order to procure the release of these shares, unsuccessfully. Then followed first police Court proceedings, and then a suit in the High Court of Bombay for a declaration of title in respect of 163 shares and for incidental reliefs including an injunction restraining the Murarkas from making use of them for voting power. The importance of this latter matter is that on February 13, 1940, the directors had approved a report of the manager of the mills dated February 6, 1940, recommending an expenditure on machinery to the extent of 16 lakhs or more and for the purpose of raising 16 lakhs the directors recommended an increase of capital, *i.e.*, to double the capital of the company, and had called a meeting of the share-holders for this purpose advertised for the 19th March. The injunction, therefore, was specifically directed to prevent the Murarkas from using the votes represented by the 163 shares at the proposed meeting. The injunction was not obtained.

On March 3, 1940, this suit was filed in the Calcutta High Court by the plaintiffs, a private company, the share-holders of which are, I gather, the members of the Jhajharia joint family, holding one share in the defendant company. An injunction restraining the directors from acting and prohibiting the company meeting was sought. On the hearing of the application before McNair, J. some arrangement was arrived at, as the result of

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which a fresh circular was issued on April 25, 1940, for a meeting to be held on 15th May.

A second application for injunction was made to me.

I refused the injunction for reasons which are now immaterial but which I may possibly have to qualify when I come to discuss the legal aspects of this case.

The meeting was, therefore, held and a resolution passed in the following proportion: 412 for the resolution, 134 against. I will refer to the voting in greater detail hereafter.

One of the questions of fact which arises is the necessity or otherwise for new machinery. Therefore a considerable part of the evidence, oral and documentary, has been directed to the suggestions made from time to time with regard to the replacements and improvements. The principal proposals may conveniently be enumerated here. They are relied upon by the plaintiffs to show that nothing like a thorough overhaul in February, 1940 had even been proposed, and by the defendants to show that there always had been a necessity, and there was a continuing necessity for replacements or better machinery. In 1935 there was a proposal by the then manager to make replacements to the value of about 5 or 6 lakhs. In 1936 there was an informal meeting of the share-holders, at which Ramdhonedas himself was present, at which the need for new finance for new machinery was mooted, In 1937 the recently appointed managing agents, the Murarkas, if I recollect rightly, obtained a report from the present manager Mr. Ranchorlal. That was before his actual appointment. And in 1938 Mr. Ranchorlal made a report recommending the expenditure of a very modest figure of Rs. 35,000. In 1939 Mr. Ranchorlal made a fresh report recommending an expenditure cheque of 5½ lakhs. On July 13, 1939, this scheme was placed before the directors, who adjourned consideration of it to the month of October. The adjourned meeting took place at the mills on October 8, 1939, and at this meeting the directors after referring to the increase of prices called upon the manager to make a fresh report showing what was urgent and what could be deferred and asking him to spread the budget expenditure on new machinery or replacements over a period of three years; also directing the managing agents to invite quotations.

No other resolution of the directors intervenes before the report of Mr. Ranchorlal of the 6/7th February, 1940, which we may refer to as the big report. This, as I have already said, was considered by the directors on February 13, 1940, and for the

first time the proposed increase of capital is referred to as "financial scheme." Where and when this scheme had originated is not clear, but as a result apparently of discussion the scheme ultimately embodied in the resolution placed before the company was adopted by the directors. The shares were to be issued at a premium of Rs. 1000. It was also resolved that the new issue should be underwritten by the managing agents at a commission of 2%.

It may be convenient to state here that the managing agents are a partnership firm, four partners of which are share-holders in the defendant company and two partners are directors.

The next directors' meeting was on February 28, 1940, when various documents were approved and the under-writing agreement concluded by resolving to accept the offer of Murarka & Co. contained in their letter of February 28, 1940.

On the 13th March, 1940 there was a joint meeting of the directors and the trustees of the debenture-holders. If I remember rightly, the trustees are represented on the Board by two directors who are not share-holders. The proceedings of this meeting have been relied upon by the plaintiffs in connection with their case that this machinery was not necessary and it does appear from the discussion recorded (for no resolution was actually passed) that the trustees for the debenture-holders doubted the necessity for so much expenditure on new machinery. There are indications that the directors and the managing agents themselves, at any rate did not regard the money as urgently required for the purchase of new machinery and anticipating the inferences which I may draw, I am inclined to discover indications that the additional capital was regarded as a most useful addition to the funds required for running expenses.

I propose now to discuss the pleadings and the issues that arise.

There were two applications for injunction before me. The first was made on the 13th May before the meeting was held. The second application was made on the 4th June or thereabouts to restrain the company from acting upon the resolution and that I rejected upon grounds which are not now material.

At the beginning of the hearing an application was made for amendment, first informally and then formally, and my judgment of the 3rd June allowing amendment to be made should be read in connection with the judgment now given. Formal issues were not recorded and for this reason that having regard to the

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discussion with regard to amendment and the points involved, they have been clear to all; namely (i) jurisdiction; (ii) questions involved in the frame of the suit including all questions of parties, particularly, pleading of fraud and so forth; (iii) was there a fraud as alleged; (iv) is the plaintiff entitled to relief, and if so, to what relief?

I propose to deal first with the second issue or set of questions, namely, the frame of the suit and at some length.

In the plaint the persons who appear to be charged with fraud or concerned in the fraud are of three classes, Managing Agents, Directors and Share-holders. It is not easy to distinguish in the original plaint the party charged with what I shall call "the substantive offence." The 'phrase is repeated "Managing Agents and or the Directors," but reading the whole of it, and in particular paragraph 15, the case, as I understand it, is that the managing agents coerced the directors and the share-holders, the real wrong-doer on the facts alleged being the managing agents. But from the other hand of the scale the majority share-holders are assisting the directors who are assisting the managing agents to commit a fraud, that is from above down or from down upwards.

Generally speaking, however, the matter of principle may be discussed as if the wrong-doers were the directors, so simplifying the facts to bring them more in accordance with the English authorities where managing agents do not figure. So read the charge is that the directors (for this purpose including managing agents) procured the increase of capital with the immediate object of acquiring the majority of shares and with the ultimate object of avoiding enquiry and causing detriment to the company. The directors are supported by the majority of share-holders in the company meeting that support being due either to the influence or the coercion of the directors or the joint fraudulent intent of the supporting share-holders, and it was thus that the resolution was passed in company meeting. That, apart from the specific question of the underwriting commission, is the gist of the case.

That being so, Mr. Banerjee, supported by the authorities which his learned junior ransacked, has attacked the plaint in its head, in its body and in its tail, that is to say, cause title, body and prayer, and has sought to show that the animal is not known to legal science. This has logically led to an enquiry as to the nature of this suit involving an enquiry, as to what kind of suits of this nature are allowed by the law.

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I propose as shortly as I can without going into the cases in detail, to explain my understanding of the matter. There can of course be suits by share-holders against the company for individual wrong done to them. Apart from individual wrong there may be suits to restrain acts *ultra vires*. There is no question of *ultra vires* in this case and I propose to confine the discussion to suits other than those based upon complaints of acts *ultra vires*, although I am not suggesting that there is any fundamental difference in principle. Suits to restrain acts *ultra vires* and suits to restrain certain acts about to be discussed notwithstanding that the acts have the support of the majority of share-holders, are both exceptions to the rule that the Court will not interfere in the affairs of the company or with the decision of the majority. The Court interferes in cases of *ultra vires* acts, because it is not an act within the constitution.

In the other class of cases the Court interferes upon a different basis. They have been referred to generally as cases of "fraud upon the minority." These cases of "fraud upon the minority" however are, in my opinion, only special examples of an action by the company for what is in theory regarded as a wrong done to the company; a special form of the suit being adopted as a matter of machinery to obtain relief under special and peculiar circumstances.

If the wrong-doer has the balance of power, and therefore the company does not take action, there are two courses open. The minority may take the risk and boldly use the company's name. The other course, and what has been thought to be the better course, where the wrongful act is supported by the majority, is for the minority share-holders to sue in their own name or, as a matter of convenience, for a share-holder to sue on behalf of himself and all the other share-holders. If, however, as generally happens and must happen logically, the wrong-doers are also share-holders, these share-holders as a matter of course must be excluded from the category of the plaintiffs; hence the phrase "except those who are defendants".

In a suit so brought, the complaint is said to be of a "fraud on the minority". If by this it is understood that the minority in a company have some natural right to sue a majority which is oppressing it. If it is suggested that there is any such thing legally as a wrong done by a bigger group to a smaller group within the company, and therefore there is a cause of action by a minority *qua* minority against a majority *qua* majority, I disagree. There can be no such thing as a legal war of parties.

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Brown v. *British Abrasive Wheel Company* (1) is in my opinion not an authority for such a theory nor did Mr. Sanyal cite it as such.

In that case, if I remember rightly, the Court would not allow an alteration of articles so that the majority could expropriate a small minority. It was not allowed as being contrary to justice.

The real significance of it, in my opinion, is that it was a violation of the constitution, so to speak, the rights in other words of all share-holders who are all citizens.

Although this is a matter of theory its results on matters of practice are unusually important. The primary wrong is the wrong done to the company; in other words all the share-holders. There is, it is true, a secondary wrong in the suppression of the opposition of the minority, the over-whelming of the minority. In the normal case the distinction is purely theoretical, the wrong-doers are themselves the majority. I can conceive however of cases where the distinction may become apparent, in other words, where the primary wrong-doers, those committing the fraud or the wrongful act, are not themselves the majority but get the support of the majority.

In my opinion if this is the principle, however imperfectly expressed, it explains the matter of the form adopted in the frame of the suit as it is familiar to English lawyers.

The formula adopted in the *Atwool* v. *Merryweather* (2) series of cases is as I understand this : I retain the symbols which were used in the discussion with counsel. Alphabet Limited 24 share-holders A—Z.

X, Y, Z are putting the property of the company into their pockets, whether it be a contract, whether it be a commission or anything else. X, Y, Z are both share-holders and directors. They have the majority on the Board of Directors and can therefore make this present to themselves. They are able to override opposition in the company because though possibly inferior in number they control the majority of votes, either as holders or possibly through share-holders under their control. For instance Z might be the director making himself present and X, Y share-holders supporting.

Now, the formula of a suit is " A ", on behalf of himself and all other share-holders of the company, except those who are defen-

(1) (1919) 1 Ch. 290.

(2) (1868) L. R. 5 Eq. 464, n.; 37 L. J. Ch. 35.

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dants v. X—Y—Z and Alphabet Limited. It seems to me that in order to provide a process, the law regards the company for the purposes of the suit as split up into its units. The presence of the company as defendant requires explanation. For, if the company is the plaintiff, why should the company also appear as the defendant? *Spokes* v. *Grosvener Hotel* (1), indicates the answer. It is there in order that it may enjoy the benefit, if any relief obtained for it by share-holders and to be bound by any decree. I may refer to this again in connection with Mr. Sanyal's argument on parties, but I do not regard the company as being the real defendant.

If that be the correct formula, I come now to consider Mr. Banerjee's criticism of the cause. title in this suit, first as a pure matter of form and then still as a matter of form but indicating a substantial defect.

It is to be noted that for reasons which we need not discuss but which can well be appreciated, the plaintiff here sued on behalf of himself and "other share-holders of the defendant company" i. e., a number of them unspecified. All that is on the plaintiff's side, is the plaintiff, plus an unspecified body, or an unidentified body of other "share-holders", i. e., "A plus others.,' On the defendants' side there is the company. If this be regarded as split into its integers, that means A to Z. As a matter of form, in my opinion, this is not in accordance with the English precedents. Mr. Sanyal has showed me certain cases where the share-holders on what I call the credit side do not appear to balance the share-holders on the debit side, but on principle that is the object to be aimed at and for the reason already indicated that all the share-holders are suing or presumably suing as a substitute for the company, only excepting those share-holders who will not actually join the plaintiffs. In my opinion, however, absence of any defendant other than the company is not a defect merely of form and it is in connection with this point that I shall have to discuss Mr. Sanyal's arguments. If my view is correct, the wrong charged is not a wrong done by X—Y—Z to A—W. It is not a wrong, of class upon class, but it is a wrong done by X—Y—Z, in theory at any rate, on A—Z. X—Y—Z commit a wrong upon a group of which they are themselves integers, because by that wrong they obtain advantages superior to the detriment caused to themselves as members of that group. In the typical case *Atwool* v. *Merryweather* (2);

(1) (1897) 2 Q. B. 124.
(2) (1868) L. R. 5 Eq. 464n ; 37 L. J. Ch. 35.

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Cook v. *Deeks* (1) series, X, Y, Z are directors. They are doing the wrong and they are the majority who hold the power in the company.

Two questions seem to me to arise, first, is it sufficient to plead simply the dominance of the majority of the share-holders, or what I call the secondary fraud? In my opinion, the primary fraud must be clearly indicated. It is the gist of the action, although no doubt the pleading or the particulars may be so framed as to stress the dominance of the majority and the effectuation of the fraud through that dominance. That was the way this pleading and the amendment was framed and I deem that to be sufficient so long as it is made clear what precisely the real wrong is and who is committing it. But the second question is this: Must not the wrong-doers be specified and being specified, be made party defendants to the action? It might, I conceive, be sufficient to make them parties *qua* share-holders, although if the primary wrong be as it is, in this case that of the directors, it seems to me right and proper they should be sued *qua* directors. What I mean is this: it seems to me better at any rate not to regard their fraud *qua* directors as merged in the act of coercion by the majority. Whether that view be or be not correct, it is my opinion that you cannot charge the company with committing the fraud. A to Z minus X Y Z cannot charge A to Z with committing a fraud. Hence the sense of suing X Y Z specifically as wrong-doers, making plaintiffs the whole alphabet minus X Y Z and adding the company as defendants. I do not think that the converse of this is good, that is to say specifying the plaintiffs and then making some sort of a body of defendants out of the residue. Moreover, as a matter of form, this was not done because the plaintiffs are not actually specified or identified. In my opinion X Y Z or those represented by these symbols on the facts should be sued. In this case it is to be remembered that the real wrong-doer the managing agent firm is not only the directors but something beyond the directors, a patnership of which certain members are directors and certain members are share-holders. Whether I be right or wrong on this point, I am indebted to Mr. Sanyal for a very careful argument upon it which I have analysed as follows:

That as a matter of form in England, we do not find in this class of case, the parties or share-holders invariably balanced. He referred to *Brown British Abrasive Wheel Co.* (2) and I think I

(1) [1916] 1 A. C. 554.
(2) (1919) 1 Ch. 290.

have seen one another case where the balance did not seem to be perfect. There is a danger in India of becoming more technical on these points, than is warranted by the English law, but although I have stressed the matter of form I have intended to do so as indicating the principle.

(2) A point I have already mentioned, that the company is the real party. *Spokes* v. *Grosvener Hotel* (1).

As I read or have read this case, that is not the significance; on the contrary, I think the implication is that the company is in fact suing for wrong to the company, but that because certain share-holders are the plaintiffs, the company as a unit must be on the record for finality and completeness. I read the observations in this case as strengthening the view that it is really a suit by the company against the wrong-doers to the company, and that the company cannot sue itself. In that case, if I remember rightly, one of the wrong-doers was a third party. I have no doubt that there was relief sought which necessitated the presence of that third party and the wrong-doing director as a defendant.

(3) This brings me to Mr. Sanyal's most important point, namely, that the presence of defendants is to be regulated by the reliefs sought and that, where the reliefs sought are effective by an order on the company the directors and managing agents being servants and agents of the company, it is not necessary to make any other person a party.

(4) Next, Mr. Sanyal dealt with the other aspect of the matter namely, the necessity of having before the Court the party charged with fraud, and this is where in my opinion he experienced his greatest difficulty. He attempted to get rid of it in two ways, and I hope I am not doing an injustice to his argument by an analysis, which is necessarily imperfect. First, that in substance it is a wrong done by the company to itself, and therefore if the company is present as defendant there is nothing to prevent the Court making the declaration that the company has wronged itself. Alternatively, that it is wrong by the majority of the share-holders. On this line he is faced by a second difficulty, that the wrong-doing share-holders are not defendants except by an inaccurate process of subtraction of an uncertain number of plaintiffs. Now, this idea of the real wrong-doer being the majority is, I think, based upon the conception of the directors' on the managing agents' wrong being absorbed or merged into the general wrong

(1) (1897) 2 Q. B. 124.

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of oppression by the majority. I have already expressed my view on that. In my opinion the gist of the wrong is still the advantage gained or intended to be gained by Z. Notwithstanding that, Z is supported in obtaining his advantage by X and Y share-holders under his control. The gist of the wrong is still—and I am probably repeating myself—Z obtaining an advantage by using his power over X and Y, or put otherwise, X, Y, Z conspiring to assist Z to get his advantage. If you take the latter point of view, X, Y, Z are the wrong-doers, and X, Y, Z have not been sued. It may be that Sanyal is right in suggesting that it is not really or solely a question of parties. It may be that the Court should insist, where fraud is charged, that in proving that case the "accused" should be before the Court. That it should, therefore, be looked at rather from the point of view of particularity than of parties. My ruling for what it is worth is as follows: where a decision of the directors is attacked on the ground that it is injurious to the company; the directors should be parties. Where that act of the directers so impeached has been confirmed and is still impeached on the basis that the directors have got that confirmation by controlling the majority, still those directors should be parties.

The above discussion or analysis is based upon the inferences drawn from *W. Atwool* v. *Merryweather*, (1) *Cook* v. *Deeks* (2) series. Mr. Sanyal very pertinently pointed out that in the majority, if not all, of those cases, the wrong of X, Y, Z, was some form of taking, and therefore some form of relief was required directly against X, Y, Z. and on this ground sought to distinguish the case before me. It is for this reason that I omitted the *Fraser* v. *Whalley* (3) series, the facts of which are analogous to the case made by Mr. Sanyal.

In *Fraser* v. *Whalley* (3) the details are complicated, but in substance there were two parties differing upon policy, and what was called the Wholley group had the balance of power as directors. The Fraser group had the power in the company. To meet the situation the directors proposed to issue or take up shares. The formula for the suit was F on behalf of the share-holders except the defendants against the company, and the directors forming the Wholley group. The Court refused to concern itself with the question of policy, but as I read the observations at pp. 29, 30 and 32, notwithstanding that the directors had no ill intent, they

(1) (1868) L. R. 5 Eq. 464n ; 37 L. J. Ch. 35.

(2) [1916] 1 A. C. 554.

(3) (1864) 2 H. & M. 10.

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were regarded as interfering with the constitution, with the management of the company *qua* company, and thus causing a mischief to the company. The directors were restrained from issuing the shares. In *Punt* v. *Symons & Co., Ltd.* (1) the application was for an injunction to restrain a confirmatory meeting of the company to confirm a resolution by the company to alter the Articles for the purpose of changing the balance of power. The directors had issued certain new shares in order to get the resolution passed. Now I am not sure whether the directors were defendants. It may be that Mr. Sanyal is right; but I think not. In the last case *Piercy* v. *S. Mills & Co., Ltd.* (2) the plaintiff sued for a declaration that allotments made by the directors for the purpose of varying the balance of power were void. One P had the power in the company and wanted to be a director. The directors issued shares to themselves and to two other persons in order to get control of the company and therefore keep out P. It was proved that the company was not in need of any further capital and that the issue of shares was to obtain the passing of a special resolution to alter the Articles which would keep P out. The declaration sought was therefore granted. In the first case *Fraser* v. *Whalley* (3) so far as the form is concerned I think the plaintiff did sue on behalf of himself and all the other shareholders. I have not been able to ascertain the exact form of the plaint in the other cases, but in *Fraser* v. *Whalley* (3) and *Piercy* v. *S. Mills & Co., Ltd.* (2) the relief sought was certainly against the directors, in the first case an injunction and in the last case a declaration, and the action impugned was the action of the directors and the directors only. In *Punt* v. *Symons & Co., Ltd.* (1) the directors had caused their act to be confirmed by the company.

But in my view these cases do not stand on a principle different to the *Atwool* v. *Merryweather* (4) cases. Some body, namely the directors, is interfering with the management of the company, and is doing a wrong to the company as a whole. Somebody is impeding the free working of the constitution. I do not think, therefore, that any different rule should apply.

Now this series of cases leads me at least to begin upon the facts. In those cases the directors issued the shares. They issued the shares being a minority in the company and a majority in director meeting, with the object of becoming a majority in the

(1) [1903] 2 Ch. 506. (2) [1920] 1 Ch. 77.
(3) (1864) 2 H. & M. 10. (4) (1868) L. R. 5 Eq. 464n; 37 L. J. Ch. 35.

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company. The obvious distinction, whether it be fundamental or not, is that here the increase of capital, although initiated by the directors, is the act of the majority itself. Generally speaking, you cannot charge a majority in the company with a wrong in adding to the voting power of the directors. So far as I know there is no inherent wrong in that. A majority can increase its own majority, generally speaking, unless there be an element of expropriation or coercion. Mr. Banerjee, therefore, contends that in no way can the present case by an analogy be brought within the *Fraser* v. *Whalley* cases (1); in particular, as under our law of companies, all the existing share-holders must be given an equal chance of getting the additional capital, and were in fact given, so far as the scheme was concerned, that chance.

That is a formidable difficulty in the way of Mr. Sanyal. It means that Mr. Sanyal will have to show on the facts a great deal more than what was established and easily established in the *Fraser* v. *Whalley* (1) cases. But I shall not rule that in no case a wrong could arise. It is to my mind conceivable that the directors, though not themselves issuing the shares, might so arrange a scheme of new issue, including the resolution to be passed by their influence, so that automatically the result will be to give them the bulk of the new shares. The first obvious comment is that in order to do so they must already have a majority in the company, which should make the whole scheme unnecessary. To this on the facts of this case Mr. Sanyal has rejoined that that majority in this company meeting was doubtful. It was doubtful in respect of the 163 shares then and still the subject-matter of a title suit. It seems to me, therefore, and I shall not rule to the contrary, that the directors might be assailed if it is established first that the increase of capital is for the purpose of power; secondly, that the passing of the company resolution confirming the increase was procured by their own power, by the power of their dependants or by any kind of device. In this case certain devices have been alleged. The device of suppression of notice and of shortness of time has gone by the board. The devices now relied upon were the under-writing agreement and what is alleged to be a trick or whatever other phrase may be appropriate, namely, the 163 shares. In that indirect manner the 163 shares are relevant. Mr. Sanyal cannot of course claim that the 163 shares should have been on the one side and not on the other. But he relies

(1) (1864) 2 H. & M. 10.

upon these circumstances as an indication that the company's consent was brought about improperly and that the scheme *prima facie* was bound to give them the bulk of the new shares.

The two branches of Mr. Sanyal's case, therefore, are as follows : first, the 2% under-writing agreement, and secondly, the scheme to increase the capital to obtain balance of voting power. The ultimate motive of obtaining this balance seems to be on the authorities immaterial.

I will deal quite shortly with the 2% under-writing commission. The case made falls within the *Cook* v. *Deeks* (1) series. Mr. Banerjee contends that this did not form part of the resolution. It is perfectly true. It was, however, part of the scheme sanctioned by the company. There is, therefore, no question of fraud by the majority as regards the 2% commission. But the difficulty is this, that the wrong-doers are not there. The point is particularly obvious in this connection because the recipients of the 2% commission are not even all directors. They are partners in the firm of the managing agents. In any event according to the views already expressed and to my understanding of this line of English cases the actual alleged wrong-doers, namely, the Murarkas and their immediate supporters, the directors, should have been the defendants.

As regards evidence, there is not sufficient, in my opinion, to find that the action, if to be regarded as the action of the company because it is implied or involved in the general scheme, was either fraudulent or so unreasonable as to lead inevitably to the conclusion that they were helping to make a present to the Murarkas.

The under-writing, however, can still be used and was used by Mr. Sanyal as a part of the other branch of the case, namely, a means of getting the bulk of the capital for themselves.

It is convenient to restate what Mr. Sanyal in order to succeed in a suit of this kind has to establish. First, that the Murarkas motive in putting forward the scheme was substantially, if not solely, to increase their voting power and obtain a majority that the directors supported the Murarkas either because they were under the control of the Murarkas or with the same object ; and lastly that the share-holders supported the directors and the Murarkas either because they were under the control of the Murarkas and for directors or because, they had a similar wrongful intent. In connection with this particular kind of complaint, there

(1) [1916] 1 A. C. 554.

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is the word "fraud", but it is clear that no immediate or ultimate dishonest motive is necessary. It is superfluous, if Mr. Sanyal establishes his case, to prove that the Murarkas are going to do wrong, are going to injure the company. If it is necessary, it has not been proved and it was impossible to prove. Secondly, and here I touch upon a point which I should have liked time to allow Mr. Khaitan to argue further, it is necessary to prove that the share-holders have supported the directors and managing agents, either because controlled by them or because they had substantially the same motive. The mere fact that they support frivolously or unreasonably might not be sufficient. I do not, however, propose to rule that it is essential in all cases that the supporting share-holders should have the same identical wrongful intent as the directors they support. Proof of party feeling or animosity by itself would not be enough. That such animosity existed is obvious. The major animosity between the Jhajharias and Murarkas and how many minor animosities, no one knows. This question of animosity, however, cuts both ways.

In connection with the dispute between the Jhajharias and the Murarkas there is the specific matter of 163 shares. I must not be taken as expressing any view or giving any decision as to what would be the position if it is ultimately established that the Murarkas were not entitled to or have wrongfully used the 163 shares as part of their voting power in the meeting. The only manner that this matter has been used before me, if I have not already so indicated, is for the purpose of shewing that the actual majority at the date of the meeting was not so secure to exclude the necessity for the Murarkas to use other means to put it beyond doubt.

The plaintiffs, however, and Mr. Sanyal with his usual ingenuity have used this Jhajharia—Murarkar war as a preface or introduction to the scheme which he characterises as a major engagement in this conflict.

Mr. Banerjee on the other side in order to disprove the motive has relied upon the results according to have inconsistent with the alleged intention. His point is that the Murarka's majority on 1600 is little if at all greater than their majority of the 800. But if I have followed the figures, it seems to me that the Murarkas will be upon their under-writing by a substantial number of shares. The question is whether this is only the normal result of any such proceeding or whether it is the real object of the whole scheme.

In order to prove the motive it is necessary for the plaintiffs to establish that there was no need for capital and it is upon this that

the main conflict of evidence has turned. Mr. Sanyal makes the attack on two lines, first that the machinery was not necessary, and secondly, assuming that machinery was necessary, that the company had funds. That, as I stated, was the main subject-matter of the evidence, documentary or oral. The other subject-matter of oral evidence which is of importance is the question of control; how far the directors controlled the other share-holders who supported them.

Dealing with the second matter first, the question of control, this again laid to a conflict of evidence between the witnesses, the Jhajharia witnesses and a witness called on behalf of the company, the Mill Manager, Mr. Ranchorlal, and I am, therefore, called upon especially as the matter may go further to say something of the witnesses. Mr. Ramdhone Das Jaferia and Nanda Kishore, his son, gave evidence. They have the misfortune to be witnesses likely to make a poor impression. That they made such an impression in Bombay of which fact I was reminded by Mr. Banerjee has not affected me. Some allowance must be made for them. That they argued their own case would be obvious from a perusal of the record, but it is to be remembered they have spent many years in listening to their counsel argüing cases for the most part unsuccessfully have I presume come to the conclusion that they could do better. Secondly, the younger man is undoubtedly at a disadvantage with his English. He speaks fluently but his manner and delivery are irritating. They have a feeling, they have a legitimate grievance of some kind. That they would adhere rigidly to the truth, I do not suggest, but that I not having heard the Murarkas, to award them the paths of unveracity would be unfair. Their evidence with regard to incidents of August 1938 was not accurate and I doubt whether we should have heard much about the arrangements if the letters had been disclosed. The case will not turn upon that. Were it necessary I should not feel myself entitled to rely upon their evidence as to Dr. Deshmukh's admission that he was under the Murarka's control and was bound to vote according to their wishes. But if I have not ruled already, it seems to me that that admission if proved would not be admissible in evidence against the Murarkas. The evidence, therefore, of control must rest upon such inferences as can be legitimately drawn, and the question is how far they can be drawn. I repeat, it seems to me necessary (an exacting necessity, but still a necessity) for Mr. Sanyal to prove for instance that Mr. Deshmukh's proxies were definitely supporting the

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scheme for the purpose of giving power to the Murarkas and substantially with that intention, or because actually controlled by the Murarkas. On the evidence that can be said to have been established.

I come last to the matter which has been most agitated, the need for capital.

It is of course quite impossible for the Court to go into this as a technical matter. The only thing that counsel on either side can legitimately ask of the Court is an opinion whether the object was or was not an excuse, a pretext. That introduces the evidence of Mr. Amritlal Ranchorlal, who was thrown into the battle for this purpose and it was something of a battle for him because he was subjected to a rigorous, but not unfair cross-examination. He was somewhat hustled but capable of taking care of himself, and counsel did not extract from him any answer which he had not really intended to give. This gentleman is very intelligent, has an excellent delivery, and therefore instead of making some allowances for him, I think perhaps there should be a little deduction. We have not heard the entire story about the report of February, 1940. We have not heard how it was that Mr. Ranchorlal was emboldened as a Mill Manager to ask for so much when he was told to ask for a little less. The directors on the 13th February, 1940 with unexpected swiftness were ready with their scheme of finance, ready with a sanction of 16 lakhs for machinery, which compares very favourably with their previous readiness to improve the mill. This does not prove that the Murarkas or the directors had as their object or sole object the obtaining of voting power. The question is how far Mr. Sanyal could ask me to draw that as a legitimate and proper inference. We know that the machinery could not be obtained, it might take years to obtain. Further the share-holders were not taken deeply into the confidence of the directors but this again is not unusual and that is not the complaint in the suit. For instance, there was nothing to indicate that half or more of this money might be used by the directors for running expenses. We do not know the sequel of the discussion of the 13th March, 1940. There was to have been some correspondence but ultimately the objection of the debenture-holders directors seems to have evaporated. I am inclined to draw these inferences, that the mill could do well with new machinery. Whether it required 16 lakhs or not, that Mr. Ranchorlal with 16 lakhs of machinery could make a success of his mill is, I think, highly probable. That Mr. Ranchorlal would have been em-

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boldened to suggest 16 lakhs of machinery with any hope of obtaining it without some encouragement from somebody is again doubtful. I think there must have been some encouragement to him as a mill manager not to minimise his demand. It seems to have been a good or fair opportunity for raising capital. It seems that assuming machinery could not be obtained or only obtained by stages, this capital was going to be extremely useful for the running of the mill. That brings me to the balance-sheet.

Mr. Bose, I think, it was, and the plaintiff's witnesses asked me to find upon the balance-sheet that this company had capital or reserves available out of profits for the purchase of machinery, at any rate sufficient for the purchase of this or of any other machinery. In my opinion, which on this subject is of the minimum value, that is not the case. It is obvious that the impressive figures for reserves including that for depreciation and repairs funds on the capital side are mere national or balancing entries against the assets as valued on the other side, and that the reserves on the other side will disclose nothing in the way of actual reserve or securities for reserve except the 1,25,000 Government of India Loan, those being the only liquid assets. Whether,—and this is relevant to the question of replacements—the amount written off for depreciation fairly represents depreciation is not a matter on which I can express any opinion. But what does appear to me is this, that in all these balance-sheets the little explanation on the assets side, so much "written off from the profits" of the previous year, which is related to the report to the share-holders of the previous year stating that so much has been "set aside as provision" for the plant and machinery, is wholly anaesthetic. It increases the feeling of security. It will appear again in the details of the profit and loss account. It is true that a careful scrutiny will show that the whole of the profits has actually been taken for some other purpose. The result generally is this, that apart from the actual replacements of machinery, notwithstanding these little comforting touches, nothing has been actually put aside for depreciation, and that all that is available to the company is the block of assets against which money might be raised. If that is right, it does not support the plaintiff's case to the effect that the money was not wanted. It might support a complaint that the company had been painted in the balance-sheet in a manner not warranted by the facts.

There remains an argument that the company might have borrowed, but there was already the debentures,

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In those circumstances and even drawing inferences to the extent I have indicated, in favour of Mr. Sanyal's client what is the final result? Is it sufficient, to take that matter in two stages, for a finding that the share-holders passed this resolution in order to help the Murarkas and directors or directors and Murarkas to obtain the balance of voting power? They may not have acted with the knowledge of the full facts, it is true. But the Court can only intervene on a finding that this decision was for the purpose which I have specified. Intervention on any other basis would be, in my opinion, an interference with the constitution of this company; would be a substitution of the Court's opinion on a matter which is the exclusive province of the share-holders. I doubt further, dealing with the other stage, whether there is sufficient to warrant the inference that the original proposal by the directors was wholly or substantially for the purpose of obtaining voting power. I think not. I think that their motives may well have been mixed, and I have said sufficient to indicate that possibility. But to succeed, Mr. Sanyal has those two matters to establish, especially difficult in a case of this nature, and in my opinion on those two points, although we may not know the whole details of the matter, although it may well have been realised by the Murarkas that is a result they might have in the end quite a number of extra shares, that is not sufficient.

I am, therefore, unable to find on the facts that a fraud was committed upon the company of the nature alleged. I have already held on the technical branch of the case that it is not sufficient to allege that fraud against so to speak persons unknown, or rather to allege it generally against the company and not against specific persons who must be made parties to the suit. In these two grounds the suit fails.

I have not had time to refer to the evidence on the point of jurisdiction. In the result my decision on that point is unnecessary, and subject to possibly a reference to the evidence, I give my decision on the basis that this Court has jurisdiction.

There are one or two minor technical points that were argued before me, one of which I shall refer to in its proper place, namely, Mr. Banerjee's point with regard to Order 1, rule 8. I am not so interested in the point that after the passing of the resolution and the amendment there was a different class. In a case of this kind it is not possible for the officer, dealing with the matter of leave as he does departmentally, to consider the question involved,

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I find it a matter of doubt whether leave should be granted to an indefinite group, such as "other share-holders". When the matter comes to be analysed microscopically as it has been before me, it is not possible to say whether "other share-holders," as they appear in this cause title, are or are not in the same interest. I think on principle and in practice it should be "all the other share-holders except the defendants."

Also in the course of discussing the evidence I should have referred to the inference which Mr. Sanyal asks me to draw from the fact that the directors have given no evidence. That we might have learned from them in connection with the meetings of October, 1939 and February and March 1940 quite a lot, I think, is true. But on the other hand if the view which I have expressed is right, it was not natural to expect them to afford the plaintiffs that opportunity.

The case has been ably argued on both sides, both by seniors and as to a considerable part by juniors, especially Mr. Sanyal for the plaintiffs.

The suit must be dismissed with costs,—including reserved costs.

Mukherjee and *Biswas*: Attorneys, for the Plaintiffs.

Orr, Dignam & Co.: Attorneys for the Defendants.

A. T. M. *Suit dismissed.*

APPELLATE CIVIL

Before Mr. Justice R. C. Mitter and Mr. Justice T. J. Y. Roxburgh.

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April, 9, 10, 11, 12, 15, 16, 26, 30.

MOHINI MOHAN MAJUMDAR AND ANOTHER

v.

MAHARAJA BIR BIKRAM KISHORE MANIKYA BAHADUR.*

Limitation—Limitation Act (IX of 1908), Sch. I, Arts. 116, 132—Principal and agent—Suit for recovery of specific sum of money misappropriated and to enforce a charge on immoveable property—Registered service Kabuliat—Jamanatnama, construction of.

A suit to enforce a charge on immovable property created by Jamanatnama against the agent, is governed by Art. 132, Sch. I of the Limitation Act.

Hafezuddin Mandal v. *Jadu Nath Saha* (1) followed.

Jogesh Chandra v. *Benode Lal Roy* (2) dissented from.

In case of balance, if the sale proceeds of the charged property were not sufficient to meet the decretal amount, the suit being one for recovery of specific sum of money misappropriated by agent, it is governed by Sch. I, Art. 116, being based on registered service Kabuliat and time runs from the date when the agent breaks his part of the contract as evidenced by the said document.

The Jamanatnama executed by defendant No. 1 and his wife, defendant No. 2 opened with a recital that the Maharaja had demanded security from her husband to the extent of Rs. 2,000 and that security was to be either security in immovable property or personal security. After this it was stated that the executants would be liable for the whole of the loss that might be caused by defendant No. 1 either by his negligence or by reason of his misappropriations :

Held, that defendant No. 2 (i.e. the wife) would be liable along with the property of defendant No. 1 to the extent of Rs. 2,000.

Appeal by Defendants Nos. 1 and 2.

Suit for recovery of money.

The material facts appear from the judgment.

Messrs. Upendra Kumar Roy, Jatindra Nath Sanyal, Debi Kanta Lahiri, Sibakali Bagchi (for *Nalini Ranjan Bhattacharjee*) and *Ranajit Acharjee Chowdhury* for the Appellants.

* Appeal from Original Decree No. 43 of 1936, against the decree of M. L. Mukherjee, Esq., Subordinate Judge, 3rd Court, of Tippera, dated the 30th October, 1935.

(1) (1908) I. L. R. 35 Calc. 298.

(2) (1909) 14 C. W. N. 122.

Mr. Joges Chandra Roy, Dr. Sarat Chandra Basak, Messrs. Nripendra Chandra Das (for *Rabindra Nath Dutta*), *Amarendra Mohan Mitra* and *Manmatha Nath Das Gupta* (for *Rakhal Chandra Dutta*) for the Respondent.

C. A. V.

The judgments of the Court were as follows :

Mitter, J. :—The defendant No. 1, Mohini Mohan Majumdar, was the plaintiff's law agent for looking after his cases at Kasba. He was appointed as agent by an order of the plaintiff's father dated the 15th December, 1909. He actually joined his office on the 15th January, 1910. On the 12th March, 1911, the plaintiff's father gave him an Ammokternama for the purpose of enabling him to discharge the duties of his office. On the 28th May, 1911, he executed his service Kabuliat in favour of the plaintiff's father and had it registered. The service Kabuliat is printed at page 13 of Book C.*

It is unnecessary to recite here all the terms of the service Kabuliat. It is only necessary for this appeal to notice the following conditions of service : (a) he was to look after suits and executions to withdraw the moneys deposited in Court on account of the decrees passed in favour of his employer ; (b) not to spend a single cowrie out of the sums that he withdrew from Court on account of these decrees ; (c) he was to send every week to his employer's treasury the decretal amounts so withdrawn accompanied with Barid Chalan ; (d) at the end of his service he was to make good all losses, "if after checking accounts and on examination of the other papers in the Sherista any money was found to have been defalcated or any decree allowed to be barred or any claim allowed to be time-barred on account of non-institution of suit or any kind of injury to the estate * * * " and he made himself liable to re-pay the defalcated money within one month from the date of ascertainment of the amount ; and (e) he was to submit monthly and yearly account to his employer's agents. On the terms of this service Kabuliat he continued in office till his dismissal on the 13th November, 1923.

The plaintiff's father had demanded security, either in property or personal, to the amount of Rs. 2000 from him. On the 18th June, 1912, in pursuance of the said order, he and his wife,

*We have marked part I of the paper book in First Appeal No. 43 of 1936 as 'A' and part II as 'B', and the paper book in First Appeal No. 115 of 1929 as 'C'.

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defendant No. 2, executed a Jamanatnamah and had it registered. By the said Jamanatnamah, 8 annas share belonging to him in a certain property and 5 annas and odd share in the same property belonging to his wife, the defendant No. 2 were charged. This Jamanatnamah is printed at page 18 of Book C. We shall have hereafter to consider this Jamantanamah in some detail when dealing with some of the points raised before us in the appeal.

In 1923, in the course of inspection conducted by the plaintiff's Assistant Manager Mr. Mahendra Chandra Pal, it was discovered that the defendant No. 1 had withdrawn from Court large sum of money deposited by the judgment-debtors of the plaintiff and his father on account of decrees from 1914 to 1922 and that he had not credited the same to the estate. Explanations were called for from him but these explanations were not considered satisfactory. A man was deputed to take notes from the Munsiff's Court at Kasba of the moneys withdrawn by the defendant No. 1 and not credited to the plaintiff in his book, and from the said notes the amount misappropriated by the defendant No. 1 was ascertained by the plaintiff's officer Mr. Mohendra Chandra Pal. The figure came to Rs. 9704-6-3 pies. For this defalcation criminal proceedings were started against him under section 409 of the Indian Penal Code.

While this prosecution was pending there was a compromise between the defendant No. 1 and the plaintiff. The defendant No. 1 admitted his liability to the extent of Rs. 9704 and odd as the amount of his misappropriations and paid to the plaintiff a sum of Rs. 4500. For the balance he and his wife, defendant No. 2, executed an instalment mortgage bond in favour of the plaintiff. This mortgage bond is printed at page 138 of Book C. By the said mortgage bond, full 16 annas of the properties hypothecated by the Jamanatnamah was mortgaged. Thereafter the criminal proceedings were dropped.

In 1926, the plaintiff brought a suit on this mortgage against defendants Nos. 1 and 2. A defence was taken by them that the mortgage could not be enforced as the consideration for the mortgage was unlawful. The Court of First Instance gave effect to this defence and dismissed the suit by its judgment dated the 29th January, 1920. Against the said decree passed by the Court of First Instance the plaintiff preferred an appeal to this Court on the 3rd May, 1929, being First Appeal No. 115 of that year. While

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that appeal was pending in this Court the present suit was filed by the plaintiff on the 23rd July, 1929.

On the 22nd July, 1932, First Appeal No. 115 of 1929 came up for hearing. On that date, the plaintiff appellant made an application to this Court to withdraw his mortgage suit. That application was allowed. The order allowing that application is Exhibit 102 and is printed at page 205 of Book B. After making an observation that at least a part of the consideration for the mortgage was unlawful, this Court made the following order :

" At the same time we think that merely because to the Ekrarnama (mortgage) and the suit that has been brought on it, the appellant has not lost remedy against the respondent (defendant No. 1) for such liability as may be found on the part of the latter upon proper accounts being taken. The Subordinate Judge, in our opinion, was right in his view that present suit, regarded as one founded on such liability, is premature.

"The appellant, we are informed, has now instituted a proper suit for that purpose. He desires to withdraw from the present suit with leave to prosecute the other one. This leave we readily grant. The present suit is allowed to be withdrawn and will be regarded as not having been filed. "

Thereafter the present suit was continued and it has resulted in a decree in favour of the plaintiff and against both the defendants Nos. 1 and 2. The Court below has, however, limited the liability of defendant No. 2 to Rs. 2000 to be realised from her property secured by the Jamanatnamah of 1912. Both the defendants have preferred this appeal. The finding of the learned Subordinate Judge that Rs. 9000 and odd had been mis-appropriated by the defendant No. 1 has not been challenged before us by the appellants.

In order to decide many of the points raised in the appeal by the defendant No. 1, it is necessary to set out relevant portions from the plaint and the written statement of defendant No. 1. In the plaint, the plaintiff after reciting the fact that defendant No. 1 had been appointed law agent in December, 1909 and had taken up the duties of his office from January, 1910, gives the terms of defendant No. 1's service Kabuliat and of the Jamanatnamah. Then in paragraphs 7 and 8, he states that there were settlements and adjustments of accounts with the defendant No. 1. In paragraph 8 he sets out the fact that at the time of adjustment of his accounts, large sums of money which had been realised by him in respect of 151 decrees described in the second schedule to the plaint had not been shown in his accounts and the adjustments

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proceeded on the footing that they had not, in fact, been withdrawn by the defendant No. 1 from the Court. In the subsequent paragraphs of the plaint statements are made indicating that fraud committed by the defendant No. 1 by which he actually concealed from the plaintiff's officer the fact that large amounts had, in fact been withdrawn from the Court and not credited to the plaintiff in the accounts. The facts which led to the discovery of the fraud by the plaintiff's officer, Mr. Mahendra Chandra Pal, are also set out in some detail in the plaint. The plaint also summarises the explanation which the defendant No. 1 gave to Mr. Mahendra Chandra Pal, when he was asked to explain the defalcations, the explanation given by the defendant No. 1 being to the effect that he had advanced large sums of money out of his own pocket and if these sums were adjusted he would not be liable to refund any money to the plaintiff. The plaintiff further avers in effect that the fact that the accounts had been adjusted and settled in the past would afford no defence to the defendants for the amount claimed by the plaintiff in the suit on account of the misappropriations, the details of which are specified in schedules 2 and 3 of the plaint. In paragraph 16, the plaintiff gives the defendants credit for Rs. 4500 that was paid at the time when the criminal proceedings against defendant No. 1 were dropped.

In prayer Ka, he claims a decree for the balance of Rs. 5249 and odd specified in the schedules to the plaint "or for such sum for which it will be found the defendant had not submitted accounts during the period of his service and which, it will be found the defendant had misappropriated to his own use or taken by drawing false bills or the same bill twice, by surcharge and falsification of accounts by permitting the accounts to be surcharged and falsified which will appear on perusal of the papers submitted by the defendant." In prayers Kha and Ga, the plaintiff prays for a decree for sale of the properties charged by the Jamanatnamah and for a personal decree against defendant No. 1 only if his claim is not satisfied from the sale proceeds of the properties charged by the defendants Nos. 1 and 2 by the Jamanatnamah of 1912.

Schedule 2 contains the details of the decrees, 151 in number which formed the subject matter of enquiry in 1923 by the plaintiff's officer Mr. Mahendra Chandra Pal. The third schedule contains descriptions of two further decrees in respect of which the defendant No. 1's defalcation was found out after the enquiry conducted by the said Mahendra Chandra Pal. Schedule 4 contains the items of advances said to have been taken by the defendant No. 1 and

which had not been accounted for. In the course of the hearing in the lower Court the plaintiff abandoned his claim to items mentioned in schedule 4.

It is unnecessary to go into the details of written statement filed by defendant No. 1. He denied the fact that he had misappropriated the plaintiff's money and stated that he was not liable to pay the sum claimed in the plaint or any sum to the plaintiff. He set up his old story that he had advanced more moneys out of his own pocket to the plaintiff and if the accounts were gone into he would be found in credit. In paragraphs 24 and 30 of the written statement, he stated that he had submitted accounts every year and the said accounts were duly examined by the officers of the plaintiff's estate and Jamakharach in respect of account (?) thus examined was also made and that after so long a period the said accounts could not be surcharged or falsified. In these two paragraphs he admitted the statement made in the plaint that in the past accounts had been adjusted with him. For the purpose of defeating the plaintiff's claim, he averred that his account papers had been tampered with and mutilated by the plaintiff's officers who had grudge against him.

The contentions of the defendant No. 2 necessary for consideration in this appeal is of a two-fold character. We do not set out here all the defences taken by her but only those defences which are material for the purpose of this appeal. They are: (1) that she is not bound by the terms of the Jamanatnamah, because being a Purdanashin lady she did not know the nature and the effect of that document, because no one had explained the position to her; and (2) that even if she was bound by the Jamanatnamah, she had executed with her husband she had discharged her liability under the Jamanatnamah, by making a payment to the plaintiff through her husband of the sum of Rs. 3000, which represented her money, out of Rs. 4500 paid to the plaintiff in 1924.

This last mentioned defence was taken in her additional written statement filed on the 13th March, 1935 and printed at page 204 of Book A. This additional written statement was, however rejected by order No. 88, dated the 18th March, 1935, printed at page 10 of Book A.

Mr. Roy appearing for defendant No. 1 has raised a number of technical objections on the frame of the suit. He has also urged that the suit is barred by limitation and that, in any event, a sum exceeding Rs. 2000 could not have been thrown on the charged properties by reason of the terms of the Jamanatnamah.

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For the purpose of supporting the technical points raised on the frame of the suit Mr. Roy is inconsistent. For the purpose of arguing some points he said that the suit was not a suit for accounts. For the purpose of supporting other technical points he said in the same breath that the suit was a suit for taking accounts. How he could adopt the attitude in this Court that the suit was a suit for accounts is difficult to follow in view of the attitude which his client took in the lower Court when the plaintiff wanted to amend the plaint. His attitude in the lower Court is indicated in his objection to the said amendment printed at page 58 of Book A.

On the basis of the assumption that the suit is not a suit for accounts he submits: (a) that this suit for a specific sum of money is not maintainable without the plaintiff claiming general accounts; (b) that as the plaintiff has not established that accounts were settled and adjusted his prayer for leave to surcharge and falsification of accounts is a misconceived one; (c) that in terms of the leave granted by this Court on the 22nd July, 1932, in First Appeal 115 of 1929, the plaintiff was entitled only to sue the defendant No. 1 for accounts and a suit of another description is not accordingly maintainable by him.

On the basis that the suit is a suit for accounts his points are: (a) that it is not maintainable as all the account papers submitted by the defendant No. 1 have not been produced by the plaintiff; and (b) that, in any case, the form of the decree is bad,—the decree ought to have directed an examination by the commissioner of all the accounts for the whole period of service of the defendant No. 1. Having regard to the inconsistent position adopted by Mr. Roy before us it is difficult to follow him in all the details of his arguments; but in having regard to our view of the nature of the suit as already indicated in the course of the analysis of the plaint, we do not accept his contention that the suit is a suit for accounts, and hence the two grounds which he urged before us on this latter basis that the suit is a suit for accounts accordingly fail.

With regard to Mr. Roy's contentions on the basis that this is not a suit for accounts, it is our view that the suit is one for recovery of specific items of money which according to the plaintiff had been misappropriated by defendant No. 1. For the purpose of substantiating the charge for misappropriation, the plaintiff relies upon the accounts of defendant No. 1 submitted by him and settled. He charged the defendant with fraud, which on the evidence he has established, for the purpose of meeting the defence which, in

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fact, was ultimately taken by him, namely, that the adjustment of accounts was final between the parties. This disposes of the argument (a) and (b) urged before us by Mr. Roy on the hypothesis that the suit was not a suit for accounts, but should have been one.

We do not also see any force in the argument (c) of Mr. Roy that the suit as framed was not maintainable because of the form of the order of the Court by which the mortgage suit was allowed to be withdrawn. The cause of action in this suit is not the same as the cause of action on which the mortgage suit was brought. In this Court, as also in the lower Court the plaintiff made an attempt to argue that the plaint in the mortgage suit would also enable him to get accounts from the defendant No. 1. The learned Judge, however, held that the Subordinate Judge was right in considering that such a prayer was then premature. Ultimately, however, this Court granted the plaintiff leave to withdraw from the mortgage suit and the leave was granted on the express reason that the present suit was then pending. This Court accordingly had no occasion to consider or express any opinion on the frame of this suit or on the question whether this suit was maintainable or not. That was not the question then. We cannot accordingly give effect to any of the aforesaid contentions raised before us by Mr. Roy.

The next question is a question of limitation. The contention of the defendant No. 1 is that the suit is governed either by Article 62 or Article 89 or 90. It is not governed, says Mr. Roy, either by Article 116 or Article 132. For the purpose of deciding the question of limitation the following facts and dates are material. The defendant No. 1 was appointed law agent by Maharaja Birendra Kishore Manikya Bahadur. The plaintiff in the present suit Maharaja Bir Bikram Kishore Manikya is his son. The plaintiff succeeded to the Gudee on the death of his father which occurred on the 13th August, 1923. After the death of Maharaja Birendra Kishore Manikya Bahadur, the defendant No. 1 continued to be the law agent of his son, Bir Birkram Kishore Manikya Bahadur. He was the law agent at Kasba up to 1922, but he was transferred later on to Comilla as the head law agent. He was dismissed from service by the plaintiff on the 13th November, 1923. Just before his dismissal his fraud was discovered by Mr. Mahendra Chandra Pal on the 27th October, 1923. That fraud consisted in keeping concealed from the plaintiff and his predecessor the fact of the large misappropriations made by him. The present suit was filed on the 23rd July, 1929. Three other dates were mentioned to us

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but we do not think that they are of any importance in the view that we are taking on the question of limitation, because it is not necessary for the plaintiff to rely upon any acknowledgment of liability by defendant No. 1. These three dates are these: the first date is the 21st July, 1924, the date of the mortgage by the defendants to Basanta Kumar Ghosh. In this mortgage, the defendants acknowledged their liability to the present plaintiff. The second date is the 20th September, 1924, the date of the mortgage bond executed by the defendants in favour of the plaintiff. That deed also contains an acknowledgment of their liability. The third date is the 2nd December, 1925, when the defendant No. 1 made an application to the Maharaja's officer for re-consideration, in which also there was an acknowledgment of liability by him. But as we have said that in the view that we are taking on the question of limitation, it is unnecessary to examine these documents in detail because the plaintiff has not to rely on the provisions of section 19 of the Indian Limitation Act.

There are two prayers in the plaint. The first prayer is to enforce the charge created by the Jamanatnamah of 1912. That prayer comes within the terms of Article 132 of the Limitation Act, but the decision of a Division Bench in the case of *Jogesh Chandra* alias *Dhalu Ghosh* v. *Benode Lal Ray Chaudhry* (1), has been cited before us by Mr. Roy in support of the proposition that Article 132 would not be applicable in a suit by the principal against an agent although the agent had charged his immovable property for the due performance of his service. It is, however, pertinent to observe that in that case Article 89 was not applied but it was said that the suit would be governed either by Article 115, if the service Kabuliat was not registered or Article 116 if it was registered, when one of the terms of service was to render accounts at stated periods, as for instance, at the end of each year. If the aforesaid proposition be correct, this suit is clearly within time as in the service Kabuliat this is a claim for rendition of account at the end of every year and as it has been brought within six years of the discovery of the fraud. Section 18 of the Limitation Act, on the facts of this case would have made time run from the date of the discovery of fraud by Mr. Mahendra Chandra Pal in October 1923. In the last part of that judgment, however, it was held that Article 132 was not applicable although the plaintiff in that suit wanted to recover the amount that would be found due from his agent on taking accounts

(1) (1909) 14 C. W. N. 122.

by the sale of the properties charged in his Jamanatnamah. If this was the only authority on the point of the applicability of Article 132 to such a suit we would have either to follow it or in the case of our dissent to have the question decided by a larger Bench. But we are relieved of the latter course because that decision on the said point has been dissented from in express terms in a series of later decisions of this Court.

Before the said decision in *Jogesh Chandra* v. *Benode Lal Ray* (1), the same point came up for consideration before the Chief Justice Sir Francis Maclean and Mr. Justice Coxe in *Hafezuddin Mandal* v. *Jadu Nath Saha* (2). It was held that where the suit was not merely one for accounts but one to enforce in the plaintiff's favour the charge created to secure moneys which might be found due from the agent to his principal, the case fell within Article 132 of the second schedule of the Limitation Act and not under Article 89 or under Article 116. *Hafezuddin's* case (2) was not brought to the notice of the learned Judges who decided *Jogesh Chandra's* case (1).

The matter again came up for consideration before Mr. Justice Fletcher and Mr. Justice Richardson in *Trailokhya Nath Mandal* v. *Abinas Chandra Roy* (3). The case of *Jogesh Chandra* (1) was cited before the Bench. Mr. Justice Fletcher pointed out that the case was decided without reference to earlier decisions of this Court, preferred to follow *Hafezuddin's* case (2) and recorded his emphatic dissent from the decision on the said point in *Jogesh Chandra's* case (1).

The matter again came up for consideration in the case of *Madhu Sudan Sen* v. *Rakhal Chandra Das Basak* (4). The view adopted in *Jogesh Chandra's* case (1) was again placed before the Court but the Court refused to follow it and followed the cases which had taken a contrary view.

In our view, apart from the authorities, the language of Article 132 is clear. We hold, therefore, that so far as the prayer to enforce the charge on the immovable properties is concerned, the suit is governed by Article 132. In accordance with the terms of the service Kabuliat, the cause of action would arise from after a month of the ascertainment of the money defalcated. The account was ascertained in October, 1923, and the suit was filed in 1929, so well within time so far as the enforcement of the charge is concerned apart from any question which arises on the

(1) (1909) 14 C. W. N. 122.
(2) (1908) I. L. R. 35 Calc. 298; 7 C. L. J. 279.
(3) (1914) 21 C. L. J. 459.
(4) (1915) I. L. R. 43 Calc. 248.

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question of the applicability to the facts of this case of section 18 of the Limitation Act.

The question of limitation with regard to the balance if the sale proceeds of the charged property are not sufficient to meet the decretal amount will now have to be considered. We do not think that any of the Articles on which the appellants rely has any application to this case. Article 62 is clearly inapplicable. The conflict is between Articles 89 or 90 and 116 of the Limitation Act. In some cases it has been held that where there is a contract by the agent to submit accounts at stated intervals as for instance either at the end of every month or at the end of every year a suit for accounts would fall either within Article 115 if the contract was unregistered or Article 116 if it was registered. The other view is that Article 89 being the more specific Article should apply even in such a case. It is not necessary to examine these cases to decide on the conflict of authorities because the case before us is not a suit for accounts. It is a suit, as we have already pointed out, for recovery of specific sums of money said to have been misappropriated.

As we have already pointed out the account papers submitted by the defendant are only relevant for the purpose of determining the fact and the amount of defalcation. In the service Kabuliat executed by the defendant No. 1 in the year 1911, he specifically undertook to keep separate the amounts withdrawn from Courts and to remit them by Barij Chalans without spending a single Couri out of it for or on behalf of the Maharaja or for the benefit of the estate. In the said Kabuliat he also undertook after the termination of his service and after the accounts were checked to repay the amount found to have been misappropriated within a month of the ascertainment of the amount. The right to sue for the misappropriated amounts accordingly accrued, on the basis of the said Kabuliat, in November, 1923. By not paying the said amount the defendant has broken his part of the contract as evidenced by service Kabuliat. As the service Kabuliat is a registered one, the plaintiff would get six years from the said date under the provisions of Article 116 of the Limitation Act. The suit being within six years of the said date is in time for the balance that may be found due after the sale of the charged property.

In the view that we have taken above, it is unnecessary to consider the effect of the death of the late Maharaja Birendra Kishore Manikya Bahadur for the suit was not for accounts and all the defalcations were at a period before his death.

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It now remains to consider the appeal preferred by the defendant No. 2. The rejection of her additional written statement prevents her from raising the point that by reason of the payment of Rs. 4500 to the plaintiff at the time of the withdrawal of the criminal proceedings any liability she had under the terms of the Jamanatnamah had been discharged. The only defence open to her is the defence based on the fact that she was a Purdanashin lady. In her evidence she attempted to make out a case of complete ignorance. On going through her deposition it appears to us that she is a highly intelligent lady. She admits that she was asked by her husband to execute a document in favour of the late Maharaja and that document was necessary in order to enable her husband to get the employment. Her evidence also makes it quite clear that she was interested in her husband's worldly affairs, as would be natural, and that she was in good terms with her husband. The evidence adduced on the side of the plaintiff is that the document was read over to her. In spite of her denial we believe this evidence to be true. She knew that her husband had been asked to furnish security, either personal security or security in immovable property. If the document was read over to her, having regard to her intelligence she would understand that she was executing with her husband a security bond by which she was charging her own property in addition to the property of her husband. These facts have been established on the evidence.

The Jamanatnamah opens with the recital that the Maharaja had demanded security from her husband to the extent of Rs. 2000 and that security was to be either security in immovable property or personal security. The terms of the Jamanatnamah are ambiguous in some respects. After the recital it is stated that the executants would be liable for the whole of the loss that may be caused by the defendant No. 1 either by his negligence or by reason of his misappropriations. That clause although couched in wide terms would according to the principles of interpretation have to be construed so far as the defendant No. 2 is concerned with the recitals. On the principles of interpretation, defendant No. 1 would be liable to the fullest extent for his misappropriation and his properties charged in that document would also be liable to the fullest extent. But so far as defendant No. 2 is concerned, she was really in the position of a surety. Those terms must be limited in her case, as we have already stated above, by the recitals and her property would only be liable along with the property of defendant No. 1 to the extent of Rs. 2000.

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On the evidence we hold that she must have understood the effect of this document in the manner indicated above, that is to say her understanding of the document would be in accordance with the interpretation which a Court of law would put upon it. But there is one clause in the last portion of the document which creates difficulty. That clause is that if the entire amount of the plaintiff's dues from the defendant No. 1 was not realised from the property charged as security, then the properties of defendant No. 2 other than the property charged by the Jamanatnamah was to be liable for the balance,—the balance of Rs. 2000 according to the rules of interpretation. That was placing on her an extra liability beyond the liability indicated by the recitals. There is no evidence on the record that the effect of the document was explained to her, that is to say, that it was brought to her notice that on the terms of the document she was incurring this extra liability. In these circumstances, we think that it would not be right to hold her bound by the terms of the Jamanatnamah. We accordingly discharge the decree as against defendant No. 2.

The result is that so far as the appeal of defendant No. 1 is concerned it is entirely dismissed but the appeal of defendant No. 2 succeeds. The form of the decree, however, is a little defective. The decree against the defendant No. 1 would be for the amount of Rs. 5237-10-6 pies with costs and interest. Let a preliminary decree be drawn up against defendant No. 1 for the said sum together with costs of this Court with interest at the rate of six per cent per annum from the date of the lower Court's decree on the first two items and from the date of the decree of this Court on the last mentioned item. If the amount be paid by defendant No. 1 within two months from this date the property charged by him by the Jamanatnamah will not be sold. If, however, the amount be not paid within the time aforesaid the lower Court will draw up a final decree and the property charged would be sold. If there is any balance due to the plaintiff after the sale of the said property the lower Court will prepare a decree under Order XXXIV, rule 6 of the Civil Procedure Code.

The appeal of defendant No. 1 is dismissed with costs. The defendant No. 2 will bear her own costs in this Court and in the Court below.

Roxburgh, J. :—I agree.

A. T. M. *Appeal of Defendant No. 1 dismissed.*
Appeal of Defendant No. 2 allowed.

Before Mr. Justice R. C. Mitter and Mr. Justice A. S. M. Akram.

BARODA PROSAD SUKUL

v.

NAOGAON LOAN OFFICE LTD. AND OTHERS.*

CIVIL, 1940. May, 27.

Party—Mortgage Suit—Title par nount.

A party claiming title paramount in a mortgage suit is not a necessary party. *Radha Kunwar* v. *Reoti Sing* (1) referred to.

Appeal by Defendant No. 1.

Suit to enforce a mort ge.

The material facts appear from the judgment.

Dr. Radhabinode Pal and *Mr. Phanindra Kumar Sanyal* for the Appellant in No. 87.

Messrs. Gunada Charan Sen, Jotindra Mohan Choudhury, Apurba Charan Mukherji, Sushil Chandra Sen and *Binayak Nath Banerji* for the Respondents.

Dr. Radhabinode Pal, Messrs. Phanindra Kumar Sanyal and *Jogesh Chandra Sinha* for the appellant in No. 281.

Messrs. Gunada Charan Sen, Jatindra Mohan Choudhury, Girija Mohan Sanyal, Apurba Charan Mukherji, Sushil Chandra Sen, Binayak Nath Banerji and *Abinash Chandra Ghose* for the respondents in No. 281.

The following judgment was delivered :

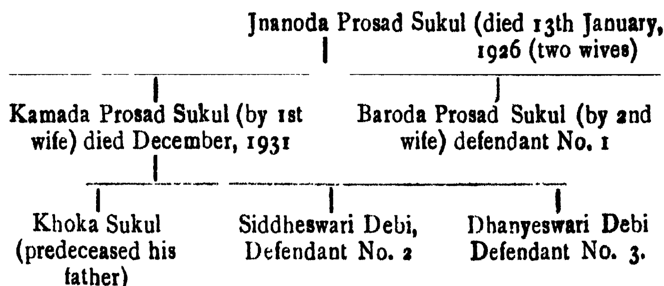
May, 27.

These appeals are on behalf of defendant No. 1 Baroda Prosad Sukul, in a suit instituted by three plaintiffs, namely, Naogaon Loan Office Limited, the Naogaon Town Bank Limited and the Santahar Union Co. Limited to enforce a mortgage bond executed by one Kamada Prosad Sukul on the 13th of December, 1926, in favour of the defendant No. 4 namely, the Natore United Bank Limited. The three plaintiffs mentioned above instituted this suit on the basis of an assignment of the said mortgage bond in their favour by the Natore United Bank Limited. The point raised by Dr. Pal who is appearing on behalf of the appeallant is a very short one. He says that his client is an unnecessary party to the mortgage suit and his name ought to have been struck out from the category of the defendants. To follow this argument a short geneology and some facts have to be stated, and the rele-

* Appeals from Original Decrees No. 281 of 1935 and 87 of 1936, against the decrees of Babu Bama Charan Chakravarty, Subordinate Judge of Rajshahi, dated the 31st May, 1935 and 12th December, 1935 respectively.

(1) (1916) L. R. 43 I. A. 187 ; I. L. R. 38 All. 488 (491) ; 24 C. L. J. 303.

vant portions of the plaint and of the defence set up by the appellant will have to be considered also.



In the plaint the plaintiffs after reciting the mortgage that had been executed by Kamada Prosad Sukul and their conveyance from the Natore United Bank Limited state in paragraph 5 of the the plaint thus :—

"The family of late Jnanoda Prosad Sukul and his ancestors had been living at Natore from time immemorial and the said Jnanoda Prosad Sukul died in 1332 B. S. leaving behind him two sons Kamada Prosad Sukul deceased father of the defendants Nos. 2 and 3, and a minor son Baroda Prosad Sukul the defendant No. 1. After his death the said two sons were in ownership and possession of the revenue paying properties by mutation of their names in the Collectorate in respect of their respective shares and in other properties separately according to their shares. Kamada Prosad Sukul, deceased was from the life-time of his father separate in mess from him and used to live separate and after his father's death he was separate from his brother and was in possession of the paternal properties by separately exercising his right and ownership."

Then they state that Kamada Prosad Sukul died leaving behind him his daughters, the defendants Nos. 2 and 3, as his preferential heirs to the properties left by him. In paragraph 6 they give the reason for making defendant No. 1 a party to the mortgage suit. The reason is that defendant No. 1 may be in possession of the mortgaged properties. In the plaint they do not state whether the family of the Sukuls was governed by the Mitakshara or Dayabhaga law. In any event, the statements made by them in paragraph 5 of the plaint they make the position of Baroda clear. If the family was governed by the Dayabhaga law. Baroda would not be the heir of his brother Kamada. If the family were governed by the Mitakshara law, even in that event Baroda would not be the heir of Kamada but his daughters would

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be, as the plaintiffs definitely alleged separation of Kamada from his father and after the death of his father from his brother Baroda. They do not further state that Baroda has in any way acquired any interest in the equity of redemption. They simply say that Baroda may be in possession. They further stated that Kamada was in possession till his death which occurred, as we have already stated, in December, 1931. The suit was brought on the 31st of May, 1935, and there cannot be any question of Baroda at the date of the suit acquiring any interest in the equity of redemption by adverse possession. On the statements made in the plaint, therefore, Baroda was an unnecessary party, because the plaintiffs do not allege that he had any interest in the equity of redemption. In fact, their allegations go further and amount to an admission that Baroda had no interest in the equity of redemption. The only persons interested in the equity of redemption were according to them the two daughters of Kamada, namely defendants Nos. 2 and 3. Defendants Nos. 2 and 3 entered appearance. Their defence was that the family was governed by the Mitakshara School of Hindu Law and that it was a joint family during the life time of Jnanoda and it was also a joint family of the two brothers Kamada and Baroda. On this defence their case was that the equity of redemption was not at the date of the suit vested in them, for the whole of the mortgage properties had passed over by survivorship to Baroda on the death of his brother Kamada. Baroda filed his defence and he put his defence thus: He first stated that the family was joint Mitakshara family up to the death of his brother Kamada. The loan incurred by Kamada was not a family debt. On the death of Kamada he had become the owner of all the properties by survivorship and the mortgage was not binding as it was not for the necessities of the family. This defence, therefore, amounted to a claim by Baroda of a title paramount to the mortgage. It is, therefore, clear that both according to the case of the plaintiffs and of Baroda, Baroda had no interest in the equity of redemption and he himself never claimed such interest.

In these circumstances Baroda pressed his case before the lower Court that he was an unnecessary party to the mortgage suit. The learned Subordinate Judge recognized the force of this contention. At page 110 of the paper book in discussing issue No. 2 he observed thus:

"From what I have found above defendant No. 1 would not be a necessary party in the case. But as he claims 16 annas

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share he is a proper party so that the disputes might be settled in his presence. Thus I find the suit is not bad for misjoinder of parties."

We do not quite follow the reasoning of the learned Subordinate Judge. If according to him, and as the fact was, the defendant No. 1 was an unnecessary party to the suit, his name ought to have been struck off. He was claiming a title paramount and it is an established rule that a party claiming title paramount in a mortgage suit is not a necessary party. The case here is worse, because the plaintiffs do not even allege that Baroda had any interest in the equity of redemption. Lord Buckmaster, L. C. observed in the case of *Radha Kunwar* v.. *Reoti Sing* (1) that in a case where persons who did claim under the mortgagor had been made parties the " joinder of those parties was irregular and that it could only tend to confusion."

We accordingly hold that Baroda ought not to have been made a party to the mortgage suit and he ought to be struck out from the suit.

The question however as to whether the parties were governed by the Mitakshara law and whether Kamada had separated from his brother was a question which was directly in issue between the plaintiffs and defendants Nos. 2 and 3. That question had to be decided by the Court because it had been raised by defendants Nos. 2 and 3. If the plea of defendants Nos. 2 and 3 had succeeded they would not have been necessary parties to the mortgage suit. But the plaintiffs were entitled to have an adjudication upon that question for the purposes of substantiating their allegation in the plaint that defendants Nos. 2 and 3 were the heirs and legal representatives of the mortgagor Kamada Prosad Sukul. It is on the basis of this decision that a mortgage decree could only be passed against the said defendants allowing them the right to redeem. These defendants Nos. 2 and 3 have not preferred any appeal to this Court and therefore all the findings in the judgment of the learned Subordinate Judge must remain and would be binding as between the plaintiffs and the said defendants only namely, defendants Nos. 2 and 3. As we dismiss defendant No. 1 from the suit, those findings would have no effect as against him in a suit that may be instituted hereafter in which the questions raised by him in this suit or any other question that may be raised by him on which he may base a claim to a title paramount to the mortgage in suit may have to be adjudicated.

(1) (1916) L. A. 43 I. A. 187 ; I. L. R. 38 All. 488 (491) ; 24 C. L. J. 303.

The result is that the appeals are allowed to the extent indicated above, that is to say, defendant No. 1 would be discharged from the suit and with it the decree as against him must go. But the decree made against defendants Nos. 2 and 3 would stand. The appellant will get his costs of the lower Court as also his costs of Appeal No. 281 of 1935 in this Court from the plaintiffs,—the hearing fee of that appeal in this Court being assessed at half of that allowed under the rules. The appellant will get Rs. 750 only as costs of the paper book in Appeal No. 281 of 1935. As regards Appeal No. 87 of 1936 there will be no order as to costs.

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A. T. M. *Appeals allowed in part.*

PRIVY COUNCIL.

PRESENT: *Viscount Maugham, Lord Russell of Killowen, Lord Wright, Sir George Rankin and Mr. M. R. Jayakar.*

THE GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LTD.

v.

JANMAHOMED ABDUL RAHIM.

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1940.
September. 17.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY.]

Limitation—Administration Bond—Default by administrator—Bond assigned to heir on attainment of majority—Action against administrator—Whether "on a bond"—Period of limitation applicable—Indian Limitation Act (IX of 1908), Article 68—Indian Succession Act (XXXIX of 1925), section 292.

An assignment of an administration bond under section 292 of the Indian Succession Act, 1925, does not have the effect of conferring a new cause of action on the assignee. Accordingly, where an administrator has executed an administration bond subject to a condition and that bond is assigned to the heir under section 292, an action brought by the heir against the administrator for a default in administration is an action on a bond within the meaning of article 68 of

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the Limitation Act, 1908, and must be brought within three years of the breach of the condition in the bond.

The time when such a condition is broken within the meaning of article 68 is the time at which the administrator commits his act of default, and not the date at which a person, such as the heir, able to give a valid discharge for the estate, claims it and fails to obtain it. The office of administrator comes to an end with the administrator's death, and accordingly, he cannot be held to have been guilty of any breach of the condition in the bond after that event.

Manubhai Chunilal v. *General Accident Fire and Life Assurance Corporation Limited* (1) overruled.

Maung San U. v. *Maung Kyaw Mye* (2) approved.

Consolidated Privy Council Appeal No. 43 of 1939 from a decision of the High Court, Bombay, in its appellate jurisdiction (*Beaumont, C. J.* and *Kania, J.*), dated March 31, 1938, confirming in substance a decision of that Court in its Ordinary Original Civil Jurisdiction (*Engineer, J.*), dated May 24, 1937.

One Abdul Rahim died intestate in September, 1924, and his widow became administratrix of the estate for the period of minority of any of his three sons (all minors) who were entitled to the estate subject to the widow's rights of maintenance. The widow, and the General Accident Fire and Life Assurance Corporation, Ltd. as sureties, in due course signed an administration bond for Rs. 3,98,060 in favour of the Registrar of the High Court in its intestate jurisdiction, the bond being subject to various conditions imposed on the widow and relating to the proper administration of the estate. In July, 1925, the widow appointed to act for her in all matters relating to the administration an attorney called Bhatra who misapplied the property. The widow died in 1929, and in 1931 the eldest son attained majority. In March, 1932, the Court made an order for the assignment of the administration bond to him in accordance with the terms of section 292 of the Indian Succession Act, 1925, and in November, 1932, the eldest son instituted these proceedings claiming from the defendant Insurance Company as sureties the amount of the loss to the estate resulting from the widow's actions as administratrix. Those proceedings were instituted in time if article 120 of the Act of 1908 be applicable. The defendants, however, objected that article 68 was applicable, and contended therefore that the action was barred. The Courts in India, holding themselves bound by authority to do so, overruled that objection, and the defendant company now appealed to His Majesty in Council.

(1) (1936) I. L. R. 60 Bom. 1027.
(2) (1923) I. L. R. 1 Rang. 463.

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Sir T. J. Strangman, K. C. and *W. W. K. Page* for the Appellants: We contend first of all that this action is clearly one on a bond, to which article 68 is applicable. Next, the latest date, it is submitted, at which the cause of action could arise was the death of the administratrix in April, 1929. Therefore this suit, instituted as it was in November, 1932, must be barred. Referred to the definition of "bond" in section 3 of the Limitation Act, and to clauses 45 and 46 of the Letters Patent, Supreme Court of Bombay, dated December 8, 1823.

We submit that when the benefit of the bond is assigned to the heir no new cause of action accrues to him; the starting point of time remains the date of the breach by the administrator. The grounds for the decision in *Manubhai Chunilal's* case (1) are open to challenge.

Referred to Blackwell, J.'s judgment in that case, to *Maung San U. v. Maung Kyaw Mye, (supra)* (2); *Kanti Chandra Mukerji v. Al-I-Nabi* (2) and *In the Goods of Young* (3) as shewing that such cases had been decided each way.

Pritt, K. C. and *Khambatta* for the Respondents: Article 68, is, we submit, not applicable. The action is a peculiar one to which no article of the Act is specifically applicable. Therefore by article 120 the plaintiff had 6 years in which to bring his action from the date when his right to sue accrued. The question is when his cause of action arose. This action is not on the bond at all. It could equally well have been instituted against the personal representatives of the administratrix to compel him to make good any loss to the estate for which she was liable. No cause of action can, it is submitted, arise until the loss is ascertained.

Supposing, however, that article 68 applied; in such a case the cause of action would not arise until the heir or some one similarly entitled to do so had claimed the estate and failed to obtain his due or some part of it. Section 292 of the act of 1925 does not merely give a new starting point by implication: It is submitted that it is to be construed as an express statutory provision to that effect.

An application is made to the Court, which thereupon confers on the applicant a statutory right of action. What else can the words "who shall thereupon be entitled to sue" mean? This is clearly, we submit, an enabling section, and such a section cannot be refer-

(1) (1936) I. L. R. 60 Bom. 1027.
(2) (1923) I. L. R. 1 Rang. 463.
(3) (1911) I. L. R. 33 All. 414.
(4) (1866) L. I. P. D. 186 (189).

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able to a right which already existed before. It is not merely confirmatory, as its wording shows. It creates a new title to the estate.

Khambatta following: If the assignee of such a bond were a minor, and his guardian failed to sue on it, the minor would surely not lose his interest clearly he would be entitled to sue when he attained majority, because a new cause of action would have arisen under section 292 of the Act of 1925, and the right of action would have accrued on his attaining majority.

Referred to ***Maharaja Jagadindra Nath Roy Bahadur* v. *Rani Hemanta Kumari Debi*** (1).

Strangman, K. C., in reply.

C. A. V.

Their Lordships' judgment was delivered by

September, 17.

Viscount Maugham:—There are here two consolidated appeals from a judgment and decree of the High Court of Judicature at Bombay in its appellate jurisdiction dated the 31st March, 1938, confirming with a variation a judgment and decree of that Court in its ordinary original civil jurisdiction. The facts are very complex and the questions raised on the appeals are questions of considerable importance. The appellants, however, who were the defendants in the suit, besides disputing liability on a number of grounds have raised the contention that the suit was barred by article 68 of the Indian Limitation Act (IX of 1908). This question was based on substantial grounds and their Lordships thought it right to hear the arguments of both sides upon it before embarking on the other questions raised on the appeal and the cross-appeal; and in the result they have come to the conclusion that the point of limitation raised by the appellants is well founded and accordingly it has not been necessary for them to go into the other matters above referred to.

In order to deal with the question of limitation it is necessary to state the following facts.

On the 18th September, 1924, Abdul Rahim died intestate at Bombay leaving him surviving a widow, Hawabai, three sons and three unmarried daughters. All his children were then minors. According to the law by which he was governed his three infant sons became entitled to his estate in equal shares subject to the right of his widow to maintenance pending re-marriage or death, and to the rights of his daughters to maintenance until marriage or death, and to their marriage expenses.

(1) (1904) L. R. 31 I. A. 203 (210); I. L. R. 32 Calc. 129.

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On the 17th March, 1925, the widow of Abdul Rahim (Hawabai), having been duly empowered by the High Court, filed a petition in the High Court for the grant to her of letters of administration to the estate of her deceased husband for the use and benefit of his three minor sons and limited to the period of minority of any of them. It was stated in the schedule to the petition that the moveable and immoveable properties of Abdul Rahim were valued at Rs. 2,75,791 and for the purposes of probate duty the estate was valued at Rs. 1,99,025 after deducting funeral expenses and debts. On the 6th May, 1925, it was ordered that on the sureties being justified for the whole of the estate of Abdul Rahim and on filing the necessary administration bond, and on payment of fees and stamp duty, letters of administration should issue as prayed to Hawabai.

On the 14th May, 1925, Hawabai and the present appellants as sureties executed a bond for Rs. 3,98,c60 in favour of the Registrar of the High Court in its testamentary and intestate jurisdiction and the head assistant to the Prothonotary and Registrar of the Court. The conditions of the bond were in the usual form. The obligation was to be void and of no effect if Hawabai

(1) should make or cause to be made a true and perfect inventory of the property and credits of the deceased which had or should come to her hand, possession or knowledge or to the hands or possession of any other person or persons for her and should exhibit or cause to be exhibited to the High Court such inventory on or before the 14th November, 1925;

(2) should well and truly administer such property and credits according to law;

(3) should make or cause to be made a true and just account of her administration on or before the 14th May, 1926; and

(4) All the rest and residue of the property and credits which should be found remaining upon the said account after being first examined and allowed by the High Court should deliver and pay unto such person or persons as shall be lawfully entitled to such residue.

On the 9th June, 1925, the letters of administration were duly issued to Hawabai on behalf of the three minor sons of the intestate for their use and benefit until one of them should attain his majority.

It is alleged by the plaint that on the 2nd July, 1925, Hawabai, who was a purdanashin lady, and illiterate, appointed one Bhatra who was related to her, being the son of her maternal uncle, her

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attorney to act for her in all matters relating to the estate of Abdul Rahim. This person, however, mis-applied the property and subsequently (on the 22nd October, 1928) committed suicide. Hawabai commenced various proceedings in an endeavour to recover the property forming part of the estate of Abdul Rahim, but on the 27th April, 1929, she died.

On the 14th November, 1931, the eldest son of Abdul Rahim, Janmahomed Abdul Rahim (who will be called "the plaintiff") attained his majority.

On the 24th March, 1932, an order was made by the High Court that the Court should assign the administration bond to the plaintiff, his heirs, executors or administrators, and it was further ordered that on such assignment the plaintiff, his heirs, executors or administrators should be entitled to sue on the bond in his or their name or names as if the same had been originally given to him or them, and should be entitled to recover thereon as trustee or trustees for all persons interested the full amount recoverable in respect of any breach thereon.

By a deed of assignment dated the 14th August, 1932, certain officers of the Court appointed for that purpose by an order of the Chief Justice purported to assign the bond to the plaintiff (the present respondent) "to hold the same unto the assignee absolutely with all such powers rights and remedies as are now subsisting thereon." The assignment was effected under section 292 of the Indian Succession Act of 1925 which is in these terms :—

The Court may, on application made by petition and on being satisfied that the engagement of any such bond has not been kept, and upon such terms as to security, or providing that the money received be paid into Court, or otherwise, as the Court may think fit, assign the same to some person, his executors or administrators, who shall thereupon be entitled to sue on the said bond in his or their own name or names as if the same had been originally given to him or them instead of to the Judge of the Court, and shall be entitled to recover thereon, as trustees for all persons interested, the full amount recoverable in respect of any breach thereof.

It should be added that under section 291 every person to whom any grant of letters of administration, with an exception not material to the present purpose, is committed must give a bond to the District Judge with one or more surety or sureties engaging in the due collection and administration of the estate

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of the deceased. The bond is in the usual form. It is the usual practice in such a case to apply section 292 and to cause the bond to be assigned to the intending plaintiff. It does not appear to be necessary to discuss the older practice under the Letters Patent of 1823 founding the Supreme Court of Bombay.

On the 2nd November, 1932, the plaintiff (respondent) filed the present suit claiming from the defendants, the present appellants, the sum of Rs. 3,98,060, or such lesser sum as represents the loss of the estate of Abdul Rahim due to the failure of Hawabai as administratrix of that estate to carry out her obligations under the administration bond. The plaint alleged four specific breaches of duty by the administratrix which can be shortly stated as follows :—

(1) The appointment of Bhatra as her attorney to manage the estate of the intestate ;

(2) allowing the sum of Rs. 50,003 shown in the inventory and accounts filed by her on the 2nd June, 1927, as being in her hands on that date to remain in the hands of Bhatra ;

(3) the failure to realise a certain share of the intestate in the estate of his deceased father and allowing such share to remain in the hands of Bhatra ; and

(4) the failure to hand over to the Accountant General of Bombay the estate of Abdul Rahim, all his heirs being minors.

The learned Trial Judge and the Appellate Court (Sir John Beaumont, C. J., and Kania, J.) in the course of their judgments held that on the question of limitation they were bound by the decision of the Appellate Court of Bombay in the case of *Manubhai Chunilal* v. *The General Accident Fire and Life Assurance Corporation Ltd*,. (1). That case related to a similar bond, similarly assigned, and the Appellate Court, Sir John Beaumont, C. J., and Rangnekar, J., overruling Blackwell, J., decided that the defence of limitation under article 68 of the Indian Limitation Act was not available. In that case as in the present the beneficiaries at the date of the grant of letters of administration were infants, and in other respects the facts are not distinguishable from those in the present case. The question, therefore, arises whether the decision in *Manubhai's* case (1) is or is not correct.

Article 68 of the Limitation Act, 1908, is one of a series of 183 articles in a schedule which relate to the limitation of suits, appeals and applications. The articles are introduced by section 3 in the following words :

(1) (1936) I. L. R. 60 Bom. 1027

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"Subject to the provisions contained in sections 4-25 (inclusive): Every suit instituted, appeal preferred, and application made after the period of limitation prescribed therefor by the first schedule shall be dismissed, although limitation has not been set up as a defence."

The provision contained in article 68 is to the following effect :—

"On a bond subject to a condition," the period of limitation is to be three years and the time from which the period begins to run is stated to be "when the condition is broken."

Article 120 is stated to relate to any suit "for which no period of limitation is provided elsewhere in this schedule." The period of limitation is in that case six years and the time from which the period begins to run is "when the right to sue accrues." The word "bond" is defined in section 2 (3). The word is stated to include "any instrument whereby a person obliges himself to pay money, to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be." It is not in dispute that the bond in this case is a bond within the terms of that definition, and it is clear that article 120 has no application if article 68 applies to the present case. It may be added that section 6 of the Act (which deals with suits by infants) clearly has no application.

Before considering the grounds on which the High Court in *Manubhai's* (1) case came to the conclusion above referred to it may be desirable to point out that a Limitation Act ought to receive such a construction as the language in its plain meaning imports. [See the decision of this Board in *Abhiram Goswami* v. *Shyama Charan Nandi* (1)]. As was well stated by Mr. Mitra in his Tagore Law Lectures, 6th ed. (1932) Vol. 1, p. 256 : "A law of limitation and prescription may appear to operate harshly or unjustly in particular cases, but where such law has been adopted by the State . . . it must if unambiguous be applied with stringency. The rule must be enforced even at the risk of hardship to a particular party. The Judge cannot on equitable grounds enlarge the time allowed by the law, postpone its operation, or introduce exceptions not recognised by it." Very little reflexion is necessary to show that great hardship may occasionally be caused by statutes of limitation in cases of poverty, distress and ignorance of rights ; yet the statutory rules must be enforced

(1) (1936) I. L. R. 60 Bom. 1027.

(2) (1909) L. R. 36 I. A. 148 ; I. L. R. 36 Calc. 1003 ; 10 C. L. J. 284.

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according to their ordinary meaning in these and in other like cases. Their Lordships think it is possible that sympathy for the plaintiff in the case which must now be considered was allowed to affect a pure question of construction. In the present case, however, it may be observed that an administration bond is as often assigned when persons of full age are concerned as when the beneficiaries are all of them infants; and that such a bond is of the nature of an additional security taken by the Court for the benefit of the beneficiaries. If a right of action under the bond become statute barred by the operation of article 68 of the Limitation Act that does not affect the rights of the benefices against the administrator. While making these observations their Lordships think it right to repeat that mere considerations of hardship in such a case should not be taken into account.

In *Manubhai's* case (1) Blackwell, J., took the view that the bond being within the definition in the Limitation Act and the action being on a bond subject to a condition, time began to run from the last date on which the condition was broken and no action could therefore be brought after the expiration of three years. In coming to this conclusion he followed the decision of the Appellate Court of Rangoon in *Maung San U and another* v. *Maung Kyaw Mye and another* (2). Blackwell, J., in an admirable judgment dealt with the effect of an assignment of a bond under section 292 of the Indian Succession Act and observed that in his opinion such an assignment merely deals with the question of title and confers upon the assignee a right to sue which he would otherwise not have had previously to the assignment, and that the section thus merely entitles the assignee to recover as a trustee for all persons interested the full amount recoverable under the bond in respect of any breach of it. On appeal it was not doubted that the bond was a bond upon a condition, but the Court held that a suit to enforce the bond by a person to whom it has been assigned under section 292 was not a suit upon a bond within the meaning of the article because, it was said, the assignment confers substantive rights upon the assignee. Their Lordships, with all respect are unable to follow this argument, nor can they agree that there is any difficulty as regards the consideration for the assignment. It is of course true that a suit by the assignee of such a bond is a suit by a person who derives title from the assignment which is authorised

(1) (1936) I. L. R. 60 Bom, 1027.
(2) (1923) I. L. R. 1 Rang. 463.

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by the terms of section 292 of the Indian Succession Act, 1925; but their Lordships are unable to see how this can be held to show that the action on the bond by the assignee is not a suit on a bond subject to a condition. Every valid assignment of a bond confers substantive rights upon the assignee, but hose rights are not, in any case suggested to their Lordships, greater than the rights possessed by the assignor. It may be noted that the ordinary security bond which is given by receivers in India under the provisions of the Code of Civil Procedure O. 40, rule 3 is given to an officer of the Court (see App. F. Form No. 10); yet it has never been suggested that a suit upon such a bond, if brought by an assignee, is in any way different from an ordinary suit by the holder of a bond, the condition of which has been broken.

There were two other grounds for the conclusion of the Court. First it was held that, assuming that article 68 applied to the case, it was impossible to say that the condition was broken until some person who was able to give a valid discharge for the estate claimed it from the administrator or his representatives and failed to obtain it. The consequence of that view was said to be that the condition was not broken within the meaning of article 68 until the plaintiff attained his majority which was less than three years before the suit was filed. In other words the death of the administrator was held not to put an end to his liability as regards future events. Their Lordships cannot agree. An administrator of an intestate is merely the officer of the Court in whom the deceased himself has reposed no trust. On the death of the former the estate of the intestate does not pass to his heirs or representatives and no authority whatever can be transmitted by him, nor has anyone claiming under him any right to interfere with or to complete the administration of the property of the intestate. The office comes to an end on death (if not before) and the course which should be taken when an administrator dies is to obtain a grant of administration *de bonis non*, and the person to whom such grant is made will be entitled to take possession of the property. It therefore seems to their Lordships impossible to hold that the administratrix in the present case could possibly have been guilty of any default or misconduct in relation to the administration after the date of her death, though, of course, her representatives would continue liable in respect of any such default or misconduct committed by her during her lifetime. It seems equally impossible to suggest that the condi-

tion of the bond could be broken by the administratrix by the default of some person in relation to the estate of the intestate after the original letters of administration had ceased to have any operation by reason of the death of the administratrix. The condition of the bond according to its terms was therefore broken at the latest on her death, that is, more than three years prior to the suit.

The other and perhaps the main ground for the conclusion of the Court in *Manubhai's* case (1) was that Section 292 of the Indian Succession Act had the effect of conferring a new cause of action on the assignee, and therefore provided a fresh starting point for the purposes of limitation. If the language of Section 292 of the Indian Succession Act be examined it is difficult to suppose that the draftsmen intended to provide for the creation of a new cause of action upon the assignment of a bond thereunder. The essential words are taken *verbatim* from Section 83 of the (English) Court of Probate Act. 1857 (20 and 21 Vict, C. 77) which provides that "the Court may . . on being satisfied that the condition of any such bond has been broken, order one of the Registrars of the Court to assign the same to some person" . . . "and such person shall thereupon be entitled to sue on the said bond in his own name . . . as if the same had been originally given to him instead of to the Judge of the Court and shall be entitled to recover thereon as trustee for all persons interested the full amount recoverable in respect of any breach of the condition of the said bond." (The modern provision to the same effect is to be found in Section 167 of the Judicature Act, 1925.) It has never been suggested that under either of these sections there is upon the assignment being made a fresh cause of action. The origin of the ancient practice of requiring the administration bond to be given to the Judge of the Court of Probate (Section 81 of the Court of Probate Act, 1857) was no doubt to enable that Court to have control over all matters relating to the enforcement of such bonds. It is scarcely necessary to add that it had obviously nothing to do with the English period of limitation as regards the enforcement of such a bond which was twenty years from the breach of the condition. It seems to their Lordships that the words used in Section 292 of the Succession Act like those used in Section 83 of the Court of Probate Act, 1857, are far from assisting the contention that

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a new cause of action arises upon the assignment. The bond is assigned to a person who is thereupon to be entitled to sue on the bond in his own name "as if the same had been ***originally*** given to him, and he is to be entitled to recover thereon . , . the full amount ***recoverable*** in respect of any breach thereof." These sentences do not in the least support the view that a fresh cause of action arises and that therefore the condition of the bond is not broken for the purposes of the Limitation Act until the date of the assignment. The judgments of the Appellate Court of Rangoon in *Moung San U* v. *Moung Kyaw Mye* (1) and of Blackwell, J., in *Manubhai's* case (2) are in the opinion of their Lordships correct and the decision of the Appellate Court in the latter case must be taken to be erroneous.

This view makes it unnecessary to consider any of the other questions raised on the appeal and cross-appeal. The defence of limitation under article 68 was a good one, and the suit should have been dismissed with costs.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the cross-appeal should be dismissed, and that the respondent to the appeal should pay the costs here and below.

Smiles, & Co.: Solicitors for the Appellants.

T. L. Wilson, & Co.: Solicitors for the Respondent.

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Appeal allowed:
Cross-appeal dismissed.

(1) (1923) I. L. R. 1 Rang. 463.
(2) (1936) I. L. R. 60 Bom. 1027.

PRESENT: *Lord Thankerton, Lord Russell of Killowen, Sir George Rankin, Lord Justice Goddard and Mr. M. R. Jayakar.*

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NATHU LAL AND OTHERS

v.

MUSAMMAT GOMTI KUAR AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT ALLAHABAD.]

Deed—Alteration after execution and without consent of party to be charged—Effect, if alteration material—Principles of English law applicable in India.

The rule administered in Courts of English law relating to the effect of material alterations in a deed made after its execution by or with the consent of any party to it but without the consent of those liable under it is applicable also in India. Such an alteration avoids the deed, not *ab initio* so as to nullify its conveyancing effect, but so as to prevent the person making the alteration of those claiming under them from putting the deed in suit for the purpose of enforcing an obligation undertaken by it. A material alteration is one which varies the rights, liabilities or legal position of the parties.

A mortgage by conditional sale was evidenced by a deed of sale and by a deed of release of the same date. The plaintiffs in an action to redeem the mortgaged properties had made a hole in the deed of release as a result of which its date, March 25, could be read as March 26, the date bourne by the plaintiffs' copy of the sale deed. The Indian date in the deed had however not been tampered with, and the corresponding Christian date was ascertainable as March 25, 1844. Further, a hole had been made in the document after the words "has sold" but the word "*Shartia*" (conditionally) remained sufficiently discernible.

Held, on those facts that the alterations were not material and that the deed of release could be relied on for the purposes of the redemption action.

Namdev Jayaram v. *Swadeshi Vyapari Mandali* (1) explained.

Privy Council appeal No. 111 of 1936 from a decision of the High Court, Allahabad, dated March 8, 1933, reversing a decision of the Additional District Judge, Moradabad, dated January 12, 1931, which confirmed a decision of the Munsif of Chandausi, dated June 4, 1929.

The predecessor-in-title of the plaintiffs, one Gulab Singh, claimed redemption of properties which had been the subject of a deed of sale signed by Gulab Singh and of a deed of release of the same date signed by the purchasers Het Ram and Tula

(1) (1920) A. I. R. (Bombay) 491.

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Ram, the predecessors-in-title of the defendants. A hole had been made in the deed of release by the plaintiffs so that the date March 25, 1844, might be read as March, 26, the date borne by their copy of the sale deed. A further hole occurred in that deed after the words "Gulab Singh..................has sold", but the word "Shartia" (condition) remained sufficiently discernible. Moreover the Indian date in the deed remained untouched and the Christian date was ascertainable as March, 25, 1844, by reference to it. The Courts below having held *inter alia* that those alterations were not material; and that the action should succeed, the High Court held that the alterations were material and that the deed of release could not be enforced by the plaintiffs, whose action was accordingly rendered out of time. The plaintiffs appealed.

The facts were fully stated in the judgment.

L. P. E. Pugh, K. C. and *J. M. Pringle* for the Appellants.

J. M. Parikh for the Respondents.

The arguments turned for the most part on matters of facts relating to the documentary alterations.

C. A. V.

Their Lordships' judgment was delivered by

May, 27.

Mr. M. R. Jayakar:—The suit out of which this appeal arises was brought on 8th September, 1928, by the appellants (plaintiffs 3-5) and respondents 29 and 30 (plaintiffs 1 and 2) against respondents 1-28 (defendants 1-28), claiming redemption of certain properties on the allegation that the deed of sale of the said properties dated 25th March, 1844, executed by one Gulab Singh (the respresentative in interest of the plaintiffs) in favour of Het Ram and Tula Ram (the representatives in interest of the defendants) and an alleged agreement to transfer the said properties bearing the same date and executed by Het Ram and Tula Ram in favour of Gulab Singh formed one transaction and constituted a mortgage by conditional sale of the properties comprised in the sale-deed.

In the plaint, plaintiffs mentioned 26th March, 1844, as the date of the mortgage completed by the execution of the two documents, and they filed with the plaint a certified copy of the said sale-deed (which is marked Exhibit 1) bearing date 26th March, 1844, and the original agreement to transfer of the same date (which is marked Exhibit B). The defendants, who represent the original mortgagees and their alienees, filed separate written statements, in which they denied the right of the plaintiffs to redeem on various grounds.

On 15th April, 1929, the Munsif, before whom the suit was filed, framed ten issues, of which only the following is now material :—

" Did Gulab Singh execute a sale-deed in favour of Tula Ram and Het Ram on 26th March, 1844, and did the latter on the same date execute an agreement to release the property in favour of the former, as alleged on behalf of the plaintiffs? If so, by these documents did the parties intend to create a mortgage by conditional sale? "

On the same date, the defendants 3 and 4 filed in Court the original sale deed, which is marked Exhibit A and bore the date 25th March, 1844. As this date did not correspond with the date in the certified copy filed with the plaint, the plaintiffs applied on 23rd April, 1929 for permission to amend the plaint by altering the date 26th March to 25th March. The ground on which this amendment was sought was that 26th March was written on account of a clerical error but the correct date was the 25th. This application was opposed by the defendants on various grounds. The Munsif, however, allowed the amendment of the plaint by his order dated 29th April, 1929. The issue was thereupon amended by the addition of the words " now in view of the amendment of the plaint, 25th March, 1844," after the words "26th March, 1844," occurring in the issue as originally framed. As the issues involved in this case depend upon the wording of the two documents, it will be useful to set out their material portion :—

" EXHIBIT A.—SALE-DEED.

I, Gulab Singh, . . . do make a valid and solemn declaration as follows :—

Five biswas of zamindari property (specified in the deed) . . , are by right of inheritance in my proprietary possession and enjoyment. Up to the time of this sale, which is correct valid and free from the rights of others . . . the property was in my proprietary possession and enjoyment. Now I have sold the above biswas with all the rights and appurtenances . . . for Rs, 2,550 of Kaldar coins . . . to Het Ram and Tula . . . The sale is valid, legal, correct and enforceable. It is free from pernicious and false conditions. I have received the entire amount mentioned above from the said vendees and have appropriated the same and made over the said property sold to them. Exchange of consideration has taken place between the parties. The vendees have ceased to have any claim in respect of the sale consideration

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and I, the vendor, have ceased to have any claim in respect of the said biswas sold. If in future anyone comes forward as a partner and co-sharer of the said property sold, I shall be liable to set up a defence in respect thereof. Hence, I, in a sound state of body and mind, have executed these few presents by way of a sale-deed, so that it may serve as evidence and be of use whenever needed.

Dated—25th March, 1844. Sd. Gulab Singh.

EXHIBIT B.—AGREEMENT TO RELEASE.

Thakur Gulab Singh . . . has sold (paper torn) the said qasba to these executants for Rs. 2,550 of the Kaldar coins and the mutation of names will be effected in the Nizamat office District Moradabad. Hence we have covenanted and given in writing that whenever Thakur Gulab Singh, vendor of the said village, or his collateral heirs pay the amount of the sale-deed in a lump sum after expiry of the period of twenty-five years, *i.e.*, with effect from 1251 Fasli to 1275 Fasli, these executants or our heirs shall willingly get the names of Gulab Singh or his heirs recorded in and our names and those of our heirs expunged from the papers of the Nizamat court, District Moradabad. We or our heirs shall put forth no excuses. If, perchance, we or our heirs put forth any excuse in accepting the amount of the sale-deed in respect of the said village, Gulab Singh or his heirs shall be authorised to deposit the amount of the sale-deed in the Hon'ble High Court, get their names recorded and our names or those of our heirs expunged. We or our heirs shall have no objection. After expiry of the period of twenty-five years, Thakur Gulab Singh or his heirs shall be authorised to pay the amount of the sale deed whenever they may like it and get the property sold released from us or our heirs and representatives. We or our heirs shall have no objection. If we do so, it shall not be entertained in the Nizamat court of the High Court. Hence we have executed these few presents by way of a conditional agreement, so that it may serve as evidence and be of use whenever needed.

Written on 26th March, 1844, corresponding to Chait Sudi 6th, 1251 Fasli.

Signature of Het Ram aforesaid.
Signature of Tula Ram aforesaid."

It may be mentioned that the agreement to release, when it was filed with the plaint, had two holes, one just above and partly eliminating the date 26th occurring at the end of the document

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and the other after the words, "has sold" occurring in the first line. On 18th May, 1929, when arguments were being heard, respondent 15 made an application alleging that the holes were made subsequent to the filing of the said document in court. The Munsif enquired into the allegation and held that it was utterly baseless. On considering the effect of the torn parts of the document, he was of opinion that they were of no consequence and that the document was genuine. As the document purported to be more than 30 years old and was produced from proper custody, he admitted it, exercising the discretion vested in him under section 90 of the Indian Evidence Act to presume that the signatures and attestations were genuine.

On the main issue the Munsif held that Gulab Singh executed the sale-deed (exhibit A), in favour of Het Ram and Tula Ram on 25th March, 1844, and, on the same date, Het Ram and Tula Ram executed the deed of agreement (exhibit B) in favour of Gulab Singh and that by these two documents the parties intended to create a mortgage by conditional sale. Accordingly, he ordered redemption of the property on payment of Rs. 2,550 to defendants 3-6, 8-18, 21-26 within six months. The property to be redeemed was specified in the decree.

The defendants appealed to the Court of the Additional District Judge of Moradabad on 17th July, 1929. Their appeal was heard on 12th January, 1931, and the Judge delivered judgment confirming the findings of the Munsif. He agreed with the Munsif that the holes were made before the filing of the suit and that when the plaintiffs were about to file the suit and found that the date mentioned in the copy of the sale-deed was 26th March, 1844, and the agreement bore the date 25th March, 1844, they thought that it would be absurd that the agreement preceded the sale, so they or their advisers made a hole, so that the agreement might not read as of 25th March, 1844, and it might be possible to read it as of 26th March, 1844. He also found that the agent of the mortgagee Tula Ram managed to procure an inaccurate copy of the sale-deed and handed it over to the plaintiff's ancestors, that, consequently, the plaintiffs or their predecessors could not be held responsible for the copy not being correct and that fact did not in any way affect the genuineness of the agreement. On carefully considering the place and other details relating to the said hole, he came to the conclusion that the date in the agreement was 25th March, 1844, and that the hole was made to eliminate

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the figure "5" and the Urdu letter "*pay*" so that the date might be read as the 26th.

It may be noted here that the vernacular date in the said agreement, viz, "Chait Sudi 6 1251 Fasli" was not tampered with and remained intact and it was possible, on a reference to the calendar, to find its equivalent Christian date, namely 25th March, 1844. On the question whether the Munsif had properly exercised his discretion to admit the document without proof under section 90 of the Indian Evidence Act, he agreed with the Munsif and on a comparison of the signatures on the document of the executants and the attesting witnesses with their signatures on other documents he held that they tallied. As regards the hole in the earlier part of the document occurring after the words, "has sold" he held that though the paper of the document was torn at the place, the word "shartia" (meaning conditionally) could be seen in spite of the torn portion and this word clearly indicated that Het Ram and Tula Ram admitted that the sale was a conditional one and consequently the contract was one of mortgage and not of sale. A decree was passed accordingly.

Against the said judgment and decree the defendants appealed to the High Court of Allahabad on 3rd February, 1931. The appeal was heard as a second appeal by a bench composed of Iqbal Ahmad and Kisch, JJ. The learned Judges confirmed the findings of the lower Court that the transaction was a mortgage by conditional sale evidenced by the two documents, exhibits A and B. They also held that, in the second appeal, the genuineness of the agreement exhibit B concurrently found by the two lower Courts could not be challenged. But the learned Judges were of opinion that, having regard to the circumstances of suspicion to which they referred in their judgment, the Trial Court had not exercised a proper discretion in raising the presumption of genuineness of the said agreement and admitting it in evidence without calling upon the plaintiffs to prove it. But they thought that that conclusion was not sufficient to dispose of the appeal as it would not be proper to overrule the discretion of the Trial Court and reject the document without sending the case back for re-trial and giving the plaintiffs an opportunity of supporting the presumption. This they thought unnecessary, as, in their opinion, the hole near the date was a material alteration made in the document by the plaintiffs, which rendered the document void, so that it could not be used for the enforcement of the right to

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redeem the property in question. In the result, they allowed the appeal and dismissed the suit with costs. A decree was accordingly drawn up on 8th March, 1933.

Against this judgment and decree, plaintiffs 3-5, have appealed to His Majesty in Council. The principal question for determination is whether the holes, assuming they were made by the plaintiffs as the lower Courts have found, were material alterations rendering the document void for any purpose whatever. As all the Courts below have concurrently held that the document in question is genuine, the finding was not challenged before their Lordships.

The rule relating to the effect of material alterations in a deed made after its execution, by or with the consent of any party thereto, as it prevails in English Courts, can be briefly summarised as follows :—

"If an alteration (by erasure, interlineation or otherwise) is made in a material part of a deed after its execution, by or with the consent of any party thereto or person entitled thereunder, but without the consent of the party or parties liable thereunder, the deed is thereby made void. The avoidance however is not *ab initio* or so as to nullify any conveyancing effect which the deed has already had ; but only operates as from the time of such alteration and so as to prevent the person who has made or authorised the alteration and those claiming under him, from putting the deed in suit to enforce, against any party bound thereby who did not consent to the alteration, any obligation, covenant or promise thereby undertaken or made.

A material alteration is one which varies the rights, liabilities, or legal position of the parties ascertained by the deed in its original state or otherwise varies the legal effect of the instrument as originally expressed, or reduces to certainty some provision which was originally unascertained and as such void, or may otherwise prejudice the party bound by the deed as originally executed.

The effect of making such an alteration without the consent of the party bound is exactly the same as that of cancelling the deed. The avoidance of the deed is not retrospective and does not revest or re-convey any estate or interest in property which passed under it. And the deed may be put in evidence to prove that such estate or interest so passed or for any other purpose than to maintain an action to enforce some agreement therein contained." (1)

(1) Halsbury's Laws of England ; 2nd Edn. Vol. 10 ; p. 227, para. 287.

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It was urged before their Lordships that there was no decision of this Board authoritatively laying down whether the said rule was applicable to Indian cases and, if so, with any and what modifications. Attention was invited to three decisions of this Board, one in 1861 and the other two in 1864. In the first of these cases (1) the rule was applied in a modified form. The question arose in a suit in the nature of an ejectment to recover possession of certain properties and to set aside a *sunnud* or deed under which they were held, on the allegation that the deed had been altered after execution and its purpose entirely changed by the insertion of words of limitation creating hereditary rights. Lord Justice Knight Bruce, delivering the judgment of the Board, treated the alteration as if it affected merely the proof of the document, rendering it more suspicious and doubtful but held that the party responsible for the alteration could satisfactorily explain the existing state of the document by "corroborative proof, independently of the instrument, strong enough to rebut the presumption which arises against an apparent and presumable falsifier of evidence." In the second case (2) an ancient tenure of land, which was proved *aliunde* to have existed, was sought to be supported by a forged document. The Judicial Committee again treated the forgery merely as affecting the proof of the document and observed that where forged documents are produced to support a case, that fact naturally creates suspicion, but if the Appellate Court has to deal with a just case, though foolishly and wickedly attempted to be supported by false evidence, such circumstances will not prejudice the judgment on the merits, when the case is supported by independent evidence. A similar view was taken in the third case (3).

It is clear from these decisions of the Board that the rule of law as stated above was not noticed therein; but that might be due to various reasons. It might be that the rule had not been fully evolved or settled beyond dispute at the date of these decisions. The question now arises whether there is anything, either in the evolution or policy of this rule, making it inapplicable to Indian conditions. There is no doubt that the rule has been

(1) (1861) *Mussamat Khoob Conwur* v. *Baboo Moodnarain Singh*, 9 M. I. A. 1; 1 W. R. P. C. 36.

(2) (1864) *Ranee Surnomoyee* v. *Maharajah Sutteeschunder Roy Bahadoor*, 10 M. I. A. 123 2 W. R. P. C. 13.

(3) (1864) *Sevajj Vijaya Raghunadha* v. *Chinna Nayana Chetti*, 10 M. I. A. 151.

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gradually evolved as a result of English decisions. It is unnecessary to go into details, beyond referring to the observations of Sir George Jessel, M. R., in the case of *Suffell* v. *The Bank of England* (1). In that case, the learned Judge had occasion to examine the policy and foundation of the rule, with a view to determine whether there was anything in its principle or origin requiring its restriction to deeds under seal only or whether there was good reason to extend its scope to all documents in writing (like, for instance, Bank of England Notes). Examining the foundations and development of the rule, the Master of the Rolls said that he took the general law on the subject to be then settled beyond dispute. He observed (2), "The leading case, and which from the time of James I has always been so treated, is *Pigot's* case (3) and whatever may be said of the first resolution in *Pigot's* case (3) no doubt has ever been raised as to the second resolution, which is this 'that when any deed is altered in a point material by the plaintiff himself, or by any stranger without the privity of the obligee, be it by interlineation, addition, rasing, or by drawing of a pen through a line or through the midst of any material word, the deed thereby becomes void.' So that even if a single word which is material is erased, it destroys the instrument. It was next decided that such rule of law which applies to deeds applied to documents not under seal. The case which decided this was the well-known case of *Master* v. *Miller* (4) decided in the year 1791. There Lord Kenyon, who was Lord Chief Justice of the Queen's Bench, held that the rule which applied to instruments under seal applied to documents not under seal, 'because', he said, 'no man shall be permitted to take the chance of committing a fraud without running any risk of losing by the event when it is detected'."

Referring to the policy of the rule, Sir George Jessel observed (5).

"A man shall not take the chance of committing a fraud and when that fraud is detected, recover on the instrument as it was originally made. In such a case the law intervenes, and says that the deed thus altered no longer continues the same deed and that no person can maintain an action upon it. In reading

(1) (1882) L. R. 9 Q. B. D. 555.
(2) (1882) L. R. 9 Q. B. D. 555 (559).
(3) (1614) 11 Rep. 26.
(4) (1791) 4 T. R. 320; 1 Sm. L. C. 8th Ed. 857.
(5) (1882) L. R. 9 Q. B. D. 555 (561).

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that and the other cases cited, I observe that it is nowhere said that the deed is void merely because it is the case of a deed; but because it is not the same deed. The deed is nothing more than an instrument or agreement under seal; and the principle of those cases is that any alteration in a material part of any instrument or agreement avoids it, because it thereby ceases to be the same instrument. And this principle is founded on great good sense, because it tends to prevent the party in whose favour it is made from attempting to make any alteration in it. This principle, too, appears to me as applicable to one kind of instrument as to another."

Is there anything in the principle or origin of this rule which makes it inapplicable to conditions prevailing in India? Their Lordships have no difficulty in answering the question in the negative. The rule is based on "great good sense". It is dictated by public policy and is independent of considerations of clime or race. It is consistent with the principles of equity and good conscience which have generally prevailed in India, unless they conflicted with Hindu or Mahommedan law. In their Lordships' opinion, there is no such conflict and there is no reason why the rule should not be made applicable to India.

Their Lordships are not therefore surprised to find that the rule has in fact been adopted in Indian decisions which are numerous. It is enough to refer to a few, one from each of the important provinces.

Subrahmania Ayyan v. *Krishna Ayyan* (1); *Mangal Sen* v. *Shankar Sahai* (2); *Gogun Chunder Ghose* v. *Dhuronidhur Mundul* (3); *Namdev Jayram* v. *Swadeshi Vyapari Mandali, Ltd.* (4).

Their Lordships are in complete accord with the views of Sir Richard Garth, C. J., where that eminent Judge, dealing with the argument that this rule belonged to the law of England and should not be made applicable to India, observed that he saw no reason why it should not and saw every reason why it should (7 Cal. 616 at 619).

Applying this rule to the circumstances of this appeal, their Lordships find that the relevant alterations are the following:—
(1) A hole above the date of the agreement, 26th March, 1844,

(1) (1899) I. L. R. 23 Mad. 137.
(2) (1903) I. L. R. 25 All. 580.
(3) (1881) I. L. R. 7 Calc. 616.
(4) A. I. R. (1926) Bom. 491.

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occurring at the bottom of exhibit B. About this alteration, the finding is that the letter "pay" and the figure "5" were taken away by making the hole, with the result that the date, as altered by the hole, could be read as the 26th. (2) A hole after the words "has sold" in the early part of the document. About this, the finding is that, though the paper of the document has been torn at the place, the word "shartia" (meaning conditionally) is sufficiently discernible.

If these alterations were material within the meaning of the rule stated above, there is no doubt that they would have the effect of making the agreement void and the plaintiffs would be unable to rely upon its contents for the purpose of enforcing any obligation, covenant or promise contained in it. The result would be that the covenant by the purchasers, Het Ram and Tula Ram, to release the property in the event of the vendor or his collaterals paying or depositing in a lump sum the amount mentioned in the sale-deed after 25 years, would be unenforceable. The legal position would be as follows:—The document A, the sale-deed, and document B, the agreement to release, being part of the same transaction, would create, as soon as they were executed in 1844, the relationship of mortgagor and mortgagee. This effect, which is the result of the execution of the two documents, would not be nullified by a subsequent alteration of one of them. Such alteration will not cause an avoidance of the altered document *ab initio* so as to nullify its conveyancing effect. It will operate only from the time when the alteration was made, which, according to the finding of the lower Courts, was at some date previous to the filing of the suit in 1928. In consequence of this, a suit for redemption of the property under the said mortgage would lie, but the period of 25 years mentioned in exhibit B would not be available to the mortgagor. The result will be that the period of 60 years, which would apply to a suit for the redemption of the mortgage of 1844, according to the law operative at that date, will have long elapsed before the date of the present suit and it would be barred by limitation.

To save this consequence, it is necessary for the plaintiffs to rely upon the 25 years' period, at the end of which time would begin to run under the terms of the covenant mentioned in exhibit B. This the plaintiff can only do if the alterations are not material.

The question therefore arises, are the alterations mentioned above material alterations so as to invalidate exhibit B? A material

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alteration has been defined in the rule as one which varies the rights, liabilities or legal position of the parties ascertained by the deed, etc. Do these two alterations fall within that category? Their Lordships are clearly of opinion that they do not. The first alteration relating to the date is of no legal consequence for the reason that the corresponding date, Chait Sudi 6th 1251 Fasli, was left intact. It was therefore possible, by reference to the Indian Calendar, to find out the equivalent Christian date and their Lordships have been assured that, on such reference, the 25th March, 1844, would be found to be the corresponding date. So far, therefore, as this alteration is concerned, it did not cause, in the slightest degree, any variation in the rights and obligations of the parties. The 25th March might as well have been left out without any legal consequence on the effect of the document. As for the second alteration, it is equally immaterial. The finding of the Trial and the first Appellate Court is (which has not been controverted before their Lordships), that in spite of the torn paper, as observed by the District Judge who apparently knew the language, the word "shartia" is clearly discernible and that word would mean "conditionally" and nothing else. It was not in the plaintiffs' interest to obliterate this word and there is also the additional circumstance that in the translation of this document set out in the High Court judgment, the last two lines mention in clear words that the parties had executed the document "by way of a conditional agreement, so that it may serve as evidence and be of use whenever needed." This part of the document has not been tampered with. It is therefore clear that this alteration is not material in the sense of altering the rights or liabilities of the parties or the legal effect of the document.

On this point their Lordships find themselves in greater agreement with the view of the Additional District Judge than with that of the High Court. In many of the rulings mentioned in the High Court judgment, the alteration was material, because it caused a variation of the rights, liabilities or legal position of the parties, as ascertained in the deed in its original state. In some of them, the legal effect of that document, as previously expressed, was varied. For instance, in the case of *Govindasami* v. *Kuppusami* (1), the date was altered from 11th September to 25th September. This certainly concerned the period of limitation. This case is also distinguishable on another ground. For, as pointed out in the judgment, the suit in that case was not based on any antecedent

(1) (1889) I. L. R. 12 Mad. 239.

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transaction for which the instrument was given as security. In the case of *Namdev Jayaram* v. *Swadeshi Vyapari Mandali* (1), the date May, 1922, was substituted for October, 1920. This had the effect of extending the period of limitation and that affected the rights and liabilities of the parties under the contract. Their Lordships do not understand the Bombay case, as the High Court appears to have done, as laying down that an alteration in date is always material, irrespective of its effect upon the rights, liabilities or legal position of the parties. Similarly, the High Court was in error in relying upon the forging of the seal and signature of the Quazi on the copy of the sale-deed, Exhibit I. This alteration has nothing to do with Exhibit B, which alone had been in the possession of the plaintiffs. Exhibit I had come into the hands of the plaintiffs from the Karinda of the mortgagees, under whom the defendants claimed. Under no circumstances could this alteration have any effect in rendering void a totally different document, namely Exhibit B. The High Court appears to have been equally in error in holding that the Trial Judge did not exercise a proper discretion in raising the presumption of the genuineness of Exhibit B and admitting it in evidence without calling on the plaintiffs to prove it. It is difficult to understand the exact significance of this opinion when it is remembered that the High Court agreed with the finding of the two Courts below, that this document was genuine and refused to disturb this finding in second appeal. The Additional District Judge agreed with the Munsiff and relied on his own comparison of the signatures appearing on the agreement with other signatures of persons who purported to have signed or attested the agreement. This certainly he was entitled to do. He apparently knew the language well and, as he says in his judgment, had carefully compared the signatures and found that they tallied. Under these circumstances, if the Trial Court exercised its discretion under section 90 and the Appellate Court saw no reason to interfere with it, the High Court should have found it difficult to overrule the discretion and reject the document.

The only remaining point is whether the finding of all the three Courts below, that the documents read together constitute a mortgage by conditional sale was erroneous. This point, however, was not stressed before their Lordships and it is, besides, in accord with the view expressed by the Board in *Narasingerji Gyanagerji* v. *Panuganti Parthasaradhi* (2).

(1) A. I. R. (1925) Bom. 491.
(2) (1924) L. R. 51 I. A. 305 ; 40 C. L. J. 481.

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The result is that the appeal will be allowed, the decree of the High Court set aside and that of the Trial Court restored, decreeing the plaintiffs' suit with costs throughout. Respondents 1-28 will pay the plaintiffs' costs of this appeal.

Their Lordships will humbly advise His Majesty accordingly.

Hardcastle Sanders & Co.: Solicitors for the Appellants.

Stanley, Johnson & Allen: Solicitors for the Respondents.

R. C. C. *Appeal allowed.*

CIVIL REFERENCE.

Before Mr. Justice R. F. Lodge. and Mr. Justice N. A. Khundkar.

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1940.
July, 10.

MANINDRA NATH GHOSE

v.

MANDAR BISWAS AND OTHERS.*

Jurisdiction—Subordinate Court, when can make reference to High Court—Civil Procedure Code (Act V of 1908), O. 46 R. 1.

In order that a Court shall have jurisdiction to make a reference under Order 46 rule 1 of the Code of Civil Procedure in connection with a question arising during execution of a decree, it must be shown that the decree itself was not subject to appeal and also that the Court entertains a reasonable doubt on the question to be referred.

Oriental Loan Association Limited v. *George Pelham Hatch* (1) followed.

The material facts are stated in the following order of

Reference.

The present Execution case arises out of a decree for arrears of rent against Jonab Ali Biswas and the judgment-debtors Nos. 2 to 6 in Rent Suit No. 3222/1936 of the Court of the Munsif, 3rd Court, Jessore. After the decree, a notice under section 33 of the B. A. D. Act was received and a note was accordingly made in the

*Civil Reference No. 5 of 1939, made by A. Das Gupta, Esq., Munsif, 3rd Court of Jessore, dated 5th October, 1939.

(1) (1892). I. L. R. 17 Bom. 735.

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Register of suits "Stayed". As soon as the decree-holder filed the present application for execution, he was called upon to show cause how the application for execution could be entertained. The decree-holder accordingly filed a copy of the order of the D. S. Board at Nebalpur, to show that only the judgment-debtors Nos. 2 and 4 applied before the Board for settlement of the claim. The contention of the learned pleader for the decree-holder is that the D. S. Board acted without jurisdiction in entertaining the application for settlement of the debt in which all the debtors did not join. My attention was drawn to the sections 8 and 9 of the B. A. D. Act. In a case for settlement of a debt for arrears of rent, section 9 of the Act requires that all the debtors should join in the application before the Board.

A similar question appears to have been raised in the case of *Jagat Kishore Acharyya Chowdhury* v. *Hajrat Ali Bepari* (1). A question was raised whether the application before the Board, having regard to the provisions of section 9(1)(b) of the B. A. D. Act which provides that in the case of a debt for which two or more persons are jointly liable, all the debtors should join in making the application, was a valid one. His Lordship the Hon'ble Mr. Justice Edgley held that the question cannot be agitated before the Civil Court. The question should be raised before the D. S. Board and if the Board passes a wrong order it is open to the decree-holder to appeal to the appellate officer under section 40(1) (d) of the Act. On the authority of the ruling *Jagat Kishore Acharyya Chowdhury* v. *Hajrat Ali Bepari* (1), the Civil Court receiving a notice under section 33 or 34 of the B. A. D. Act has no jurisdiction to question the jurisdiction of the D. S. Board and has no option but to stay the entire proceedings. Section 9 (1) of the B. A. D. Act imposes one of the conditions which must be fulfilled to enable the D. S. Board to assume jurisdiction to entertain an application for settlement of a joint debt. But in view of the principle of law laid down in the case of *Jagat Kishore Acharyya Chowdhury* v. *Hazrat Ali Bepari* (1), the decree-holder's remedy was only in the D. S. Board or before the appellate officer.

In a recent ruling *Abu Taher Bazlul Rashid* v. *Chandra Moni Saha*.(2) their Lordships laid down that section 34 of the Act in so far as the effect of it is to interfere with the ordinary jurisdiction of the Civil Court must be construed strictly, though this does not

(1) (1938) 42 C. W. N. 529.
(2) (1938) 43 C. W. N. 318.

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mean that the construction might be inequitable or unreasonable. Their Lordships further held that section 8 of the Act is controlled by section 9(2). Their Lordships held that the proceedings before the Civil Court against the debtors who were not applicants before the Board cannot be stayed. This decision was based on an interpretation of section 9(2). But in section 9(2) the jurisdiction of the D. S. Board was limited to debts other than for arrears of rent. The proviso to section 9(2) also refers to debts contemplated by section 9(2). Referring to section 34 of the Act, their Lordships were of opinion, that if the entire proceedings were stayed in a case where all the debtors were not applicants before the Board, the non-applicant debtors would be benefited, 'whom the legislature did not intend to benefit at all.'

The limitation in Section 9(2) of the Act appears to restrict the jurisdiction of the D. S. Board and not of the Civil Court. The Hon'ble Mr. Justice Mukherjea observes in the ruling *Nur Mia* v. *Noakhali Nath Bank* (1) that Sections 33 and 34 are complementary sections. I submit therefore that the procedure of staying proceedings under both the sections should be guided by the same principle of law. In the case of *Nur Mia* v. *Noakhali Nath Bank* (1), the Hon'ble Mr. Justice Mukherjea observes "ordinarily when a tribunal exercises a Subordinate or special jurisdiction, the question whether the condition essential to give it jurisdiction is present or not is left to the ordinary Courts of the land. I agree however with Mr. Justice Ameer Ali in holding that there is no inherent obstacle to a Civil Court being vested with exclusive and final powers in the matter of determining the limits of its own authority . . . . . The question, therefore, narrows down to this as to how far the legislature either expressly or by implication has endowed the Debt Settlement Board with authority to determine the matters which are necessary to enable it to exercise its power under the Act." It appears therefore that His Lordship the Hon'ble Mr. Justice Mukherjea was of opinion that the Civil Court has jurisdiction to decide if the Debt Settlement Board has jurisdiction to assume jurisdiction in a particular matter. Section 9(2) of the B. A. D. Act expressly bars the jurisdiction of the D. S. Board to settle a debt for arrears of rent if all the debtors do not join in the application before the Board. Although the facts of the case of *Nur Mia* v. *Noakhali Nath Bank* (1) are different from the facts of the present case, I submit that the law laid down by their Lordships about the jurisdiction

(1) (1939) 69 C. L. J. 126; 43 C. W. N. 322.

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of the D. S. Board and Civil Courts is applicable to the present case. The question is whether the Civil Court has jurisdiction to go behind the notice under Sections 33 and 34 of the B. A. D. Act and to refuse to stay the proceedings before it on the ground that the D. S. Board has no jurisdiction in the matter, and the ruling laid down in the later case *viz. Nur Mia* v. *Noakhali Nath Bank Ltd.* (1) indicates that the Civil Court has such jurisdiction. On the authority of this later case, I submit that I am of opinion that the present execution case should be allowed to proceed.

As I have been confronted with doubts in the matter I beg most respectfully to submit the case, under Order 46, rule 1, Civil Procedure Code to the Hon'ble High Court for favour of a dicision.

No one appeared at the hearing.

The following judgments were delivered

July, 10.

Lodge, J. :—This Reference purports to have been made in accordance with the provisions of Order XLVI, rule 1. The question of law which the learned Munsif was called upon to decide, arose during execution of a rent decree. From the record, it appears that the claim in the rent suit exceeded Rs. 50 and that the rent decree was passed by a Munsif. *Prima facie*, therefore, the rent decree was an appealable decree.

In order that a Court shall have jurisdiction to make a reference under Order XLVI, rule 1 in connection with a question arising during the execution of a decree, it must be shewn that the decree itself was not subject to appeal. It was decided in *Oriental Loan Association Ltd.* v. *George Pelham Hatch* (2) that where the original decree was appealable, the Court had no jurisdiction to deal with such a reference.

A second condition necessary to give a Court jurisdiction to make such a reference is that the Court itself shall entertain reasonable doubt on the question to be referred. In the present instance it seems clear that the learned Munsif has come to a definite decision on the question and therefore can scarcely be said to entertain reasonable doubt in the matter.

In the circumstances we held that the learned Munsif had no jurisdiction to make the Reference and that consequently this Court has no jurisdiction to entertain it.

The Reference is accordingly rejected and the learned Munsif directed to decide the question himself.

Khundkar, J. :—I agree.

A. T. M. *Reference rejected.*

(1) (1938) 69 C. L. J. 126 ; 43 C. W. N. 322.
(2) (1892) I. L. R. 17 Bom. 735.

APPELLATE CIVIL

Before Mr. Justice A. N. Sen.

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1940.
July, 11, 29.

SONARAM DUTTA

v.

SITARAM CHAMARIA AND OTHERS.*

Mortgage—Validity of—Mortgage of non-existent property—Court-Fees Act (VII of 1870), Sch. II Art. 17—Suit under O. 22 R. 63 of the Code of Civil Procedure (Act V of 1908).

A hypothecation of non-existent property, though an agreement, becomes a complete hypothecation as soon as the property comes into existence.

Collyer v. *Isaacs* (1) ; *Holroyd* v. *Marshall* (2) ; *Baldeo Parshad Sahu* v. *A. B. Miller* (3) and *The Co-operative Hindusthan Bank* v. *Surendra Nath De* (4) referred to.

A suit under Order 21 rule 63 of the Code of Civil Procedure, 1908, to establish a right claimed in the execution proceeding which had been negatived, is governed by Article 17 Schedule II of the Court-Fees Act, 1870 and a prayer for removal of attachment makes no difference in the nature of the suit.

Phul Kumari v. *Ghanshyam Misra* (5) referred to.

Appeal by Defendant No. 1.

Suit for declaration.

The material facts appear from the judgment.

Messrs. Gopal Chandra Das and *Sudhir Chandra Chowdhury* for the Appellant.

Mr. Gopendra Nath Das for the Respondents.

C. A. V.

The following judgment was delivered :

July, 29.

Sen, J.: The plaintiffs' case is as follows: The defendants Nos. 2 and 3 are contractors who had obtained a contract to do certain work for the Doomdooma Town Union. They were short of funds and approached the plaintiffs who are bankers for financial help. An agreement was entered into between the plaintiffs and these two defendants whereby the plaintiffs agreed to advance

*Appeal from Appellate Decree No. 1540 of 1938, against the decree of H. C. Stork Esq., District Judge of Assam Valley Districts, at Dibrugarh, dated the 2nd May, 1938, reversing that of Moulvi A. Ahmed, Munsif of Dibrugarh, dated the 24th August, 1937.

(1) (1881) L. R. 19 Ch. D. 342.
(2) (1862) L. R. 10 H. L. 191 ; 36 L. J. Ch. 193.
(3) (1904) I. L. R. 31 Calc. 667.
(4) (1931) 36 C. W. N. 263.
(5) (1907) I. L. R. 35 Calc. 202 ; 7 C. L. J. 36 (P. C).

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them money up to a sum of Rs. 1000 charging interest thereon @ 12 % per annum. The defendants agreed to endorse to the plaintiffs all cheques paid to them by the Union for the work done in connection with the contract in payment of the advances made. The plaintiffs allege that they also hypothecated to the plaintiffs as security for the advances made all the amount that may become due to them from the aforesaid Union for the work done by them. There was a sum of Rs. 861 due from the Union to the defendants Nos. 2 and 3 on a bill for work done by them pursuant to this contract. The plaintiffs claim that this sum is hypothecated to them. The defendant No. 1 instituted a suit against the defendants Nos. 2 and 3 for the recovery of a sum of money and obtained a decree therein. In execution of the decree the defendant No. 1 attached this sum. The plaintiffs objected to the attachment and claimed that the sum had been hypothecated to them. The claim was disallowed by the Munsiff. The plaintiffs accordingly brought the present suit for a declaration of their rights and for release of the amount from attachment.

The defendant No. 1 contested the suit.

The defence taken was that there was no valid hypothecation of this sum, that the plaintiffs had not advanced any money, that the proper court fees had not been paid, and that the suit was bad as the proper consequential reliefs were not sought. Fraud was also alleged but no attempt was made to support this last plea.

The learned Munsiff in an unsatisfactory judgment in which the issues have not been clearly framed dismissed the suit after arriving at certain findings. As far as I have been able to follow his judgment the learned Munsiff holds that the plaintiffs have sought for a consequential relief and that they should have paid court fees for this relief. He also finds that there has been no valid hypothecation and that there was no good evidence to show that the plaintiffs had advanced money. On these findings he has dismissed the plaintiffs' suit.

The plaintiffs appealed. The learned District Judge has interpreted the agreement between the plaintiffs and the defendants Nos. 2 and 3 differently from the Munsiff. He holds that by the deed of agreement the money lying to the credit of the defendants Nos. 2 and 3 with the Doomdooma Town Union was hypothecated to the plaintiffs. He holds also that no court fees are payable for the consequential relief prayed for and decrees the plaintiffs' suit.

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The defendant No. 1 appeals. The first contention raised is that by the agreement between the plaintiffs and the defendants Nos. 2 and 3 there was no intention to hypothecate any sum which may become due from the aforesaid Union for the work done by the defendants Nos. 2 and 3. There is no substance in this ground. The agreement is before me and there can be no manner of doubt that the defendants Nos. 2 and 3 purported to hypothecate to the plaintiffs any sum that may become due to them from the Union for work done by them. I cannot understand how the learned Munsiff could come to any other conclusion. This is what is said in the agreement:—"And all the amount due for the said contract work remains as security for the amount advanced by you with interest". After this clear expression of the intention of the parties there is no room for the contention that there was no intention to hypothecate.

Next it was argued that as this was a hypothecation of property not in existence at the time of the hypothecation the agreement will operate not as a hypothecation but only as an agreement to hypothecate which would have to be enforced by a suit for specific performance. It was argued that until a decree was obtained in such a suit the plaintiffs could not claim any right in the property. This contention must also fail. I assume for the present that the plaintiffs have advanced sums to the defendants Nos. 2 and 3 which had not yet been repaid. The agreement between the parties was that any sum which became due to the defendants Nos. 2 and 3 from the Union for work done by them would stand hypothecated to the plaintiffs as security for the sums advanced. It is true that the dues were not then in existence and until they came into existence there could be no mortgage or hypothecation in favour of the plaintiffs as there cannot be a mortgage or hypothecation of non-existent property; I agree that there was only an agreement to hypothecate or mortgage; but as soon as the dues came into existence, equity treating as done that which ought to be done fastened upon the dues and the contract to hypothecate them became a complete hypothecation. This is the principle laid down in *Collyer* v. *Isaacs* (1) and *Holroyd* v. *Marshall* (2) and it has been applied in this Court in the cases of *Baldeo Parshad Sahu* v. *A. B. Miller* (3) and *The Co-operative Hindusthan Bank* v. *Surendra Nath De* (4). Assuming that the

(1) (1811) L. R. 19 Ch. D. 342.
(2) (1862) L. R. 10 H. L. 191; 36 L. J. Ch. 193.
(3) (1904) I. L. R. 31 Calc. 667.
(4) (1931) 36 C. W. N. 263.

defendants Nos. 2 and 3 owe money to the plaintiffs for advances made. I hold that the dues owing from the aforesaid Union to the defendants Nos. 2 and 3 stand hypothecated to the plaintiffs as security for those advances.

The next point argued is that proper court fees have not been paid for the consequential relief sought. There is absolutely no substance in this contention. This is a suit under Order 21, rule 63 of the Code of Civil Procedure and it is a suit to establish the right claimed in the execution proceedings which had been negatived. It is a suit to set aside a summary order of a Civil Court not established by Letters Patent and Article 17 of Schedule II of the Court Fees Act applies to it. The fact that the plaintiffs ask for the removal of the attachment makes no difference to the nature of the suit. The Munsiff attached the property and rejected the plaintiffs' claim in the proceedings in execution. The plaintiffs now want that order set aside and if it is set aside the attachment will automatically be released. That a suit under Order 21, rule 63 is one which falls within the purview of Article 17 of Schedule II of the Court Fees Act has been held by the Judicial Committee of the Privy Council in *Phul Kumari's* case (1). There also the plaintiff asked for several reliefs instead of merely asking the Court to set aside the order passed by the Munsiff refusing to raise the attachment. Their Lordships held that notwithstanding the several prayers in the plaint the suit was really one for setting aside the order of the attaching Court and that the only court fee payable was that prescribed by Article 17 of Schedule II of the Court Fees Act. The contention regarding the insufficiency of the court fees therefore fails.

Learned Advocate for the appellant raised another point. He showed that the learned Judge has not reversed the finding of the trial Court that the plaintiffs had not been able to prove the advances made and contended that without a finding in favour of the plaintiffs on this point the plaintiffs' suit could not be decreed. This contention must be upheld. The learned Judge has omitted to consider this vital part of the case. The plaintiffs obviously cannot get any relief unless they can show that they have made advances which have not been repaid. The amount due by the Union to the defendants Nos. 2 and 3 will be the subject of a hypothecation only if there is something due to the plaintiffs from the defendants Nos. 1 and 2 under their contract and only to the extent of these dues. The trial Court has found, as I have said

(1) (1907) I. L. R. 35 Calc. 202; 7 C. L. J. 36.

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before, that the plaintiffs have not been able to prove their advances. The learned District Judge says nothing about this point. After interpreting the contract between the plaintiffs and the defendants Nos. 2 and 3 he made certain observations which I have not been able to understand and which learned Advocate for the respondents has not been able to explain. This is what he says :— " There is no dispute that if the terms of the contract are as I find them to be that the amount for which the appellants sued is not covered by that contract and in my opinion they were entitled to a decree for that amount in terms of the prayer in the plaint. " As I have said before I am not able to appreciate what the learned Judge means by these observations. The plaintiffs were not suing for the recovery of any amount. Whatever the learned Judge may have intended to say the fact remains that he has not decided whether there is any sum owing from the defendants Nos. 2 and 3 to the plaintiffs for any advances made in terms of the agreement between them. The case must therefore be remanded to the learned Judge for a decision on this point. If the learned Judge finds that the plaintiffs have failed to prove that any sum is due he will dismiss the suit. If he finds that the plaintiffs have proved that a sum is due for advances made in the terms of their contract he will release so much of the sum which is under attachment as will meet the amount due together with interest calculated up to the date of the attachment. It was suggested by learned Advocate for the appellant that the defendant No. 1 had already realised the sum which had been attached and that the suit is not maintainable as the plaintiffs have not sued for the recovery of this money. There is no mention of this in the pleadings or anywhere in the judgments and I can take no notice of this suggestion.

The decree passed by the learned District Judge is set aside and the appeal is remanded to the lower appellate Court for re-hearing in the light of the observations made above. The costs of the appeal in this Court will abide the result of the appeal below.

A. T. M. *Appeal allowed : Case remanded.*

CRIMINAL REVISION.

CRIMINAL.
1940.
July, 16, 17.

Before Mr. Justice N. G. A. Edgley.

HARI RAKSHAK DUTT

v.

CHAIRMAN, DISTRICT BOARD, BIRBHUM.*

Possession of goods—Bengal Food Adulteration Act (Bengal Act VI of 1919) Sec. 6 (1)—Storage for sale—Delivery given but lying in the station.

Goods are stored for sale within the meaning of section 6 (1) of the Bengal Food Adulteration Act, 1919, when delivery is taken of for the purpose of sale though lying in Railway premises.

Sachi Nandan Piri v. *Chairman, Midnapore District Board* (1) distinguished.

Application for Revision under sections 435 and 439 of the Criminal Procedure Code by the Accused.

The material facts appear from the judgment.

Messrs. Jitendra Mohan Banerjee and *Hariprasanna Mukherjee* for the Petitioner.

Messrs. Satindra Nath Mukherjee and *Samarendra Nath Mukherjee* for the Opposite party.

The following judgment was delivered:

July, 17.

The petitioner in this case has been convicted under section 6(1) read with section 21 of the Bengal Food Adulteration Act (Bengal Act VI of 1919).

It appears that, on the 17th of October, 1938, the petitioner took delivery of some tins of mustard oil at the Bolpur railway station. On the same day a sample was taken from these tins by the Sanitary Inspector and it was found that the mustard oil contained therein was adulterated. The petitioner and certain other persons were subsequently prosecuted and the petitioner was convicted. It is said that the prosecution did not discharge the onus which lay on the Crown to show that the adulterated goods had actually been stored for sale within the meaning of section 6 (1) of the Act and it is also contended that any pre-

*Criminal Revision Case No. 526 of 1940, against the order of B. B. Sarkar, Esq., District Magistrate, Birbhum, dated the 28th March, 1940, affirming that of Babu D. K. Bhattacharjee, Magistrate, 2nd Class, Suri, dated the 2nd January, 1940.

(1) [1940] I. L. R. 1 Calc. 333.

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sumption which may have arisen under section 6 (4) of the Act was rebutted by reason of the fact that the goods were actually on the railway premises at the time when the sample was taken by the Sanitary Inspector.

The finding contained in the judgment of the lower appellate court is that there can be no doubt that the petitioner had taken delivery of this consignment of oil for the purpose of selling it. This being the case, it would follow that although the goods had not actually left the railway premises, they were nevertheless being stored for sale by the petitioner within the meaning of section 6 (1) of the Act. It followed that the requisite initial onus has been discharged by the prosecution. In this connection, it may be mentioned that in the case of *Sachi Nandan Piri v. Chairman, Midnapore District Board* (1), I pointed out that "In my view, in a case in which a person is prosecuted for storing adulterated food for sale, it must ordinarily be proved affirmatively that such food is actually being stored, and, in my opinion, such storage cannot be taken to include transit to a place of storage unless the adulterated food in question is actually in the physical possession of a person to whom sub-section (4) of section 6 expressly applies". That case related to the prosecution of a certain person in respect of a consignment which was found in the possession of his carter. On the facts of that case, if the petitioner himself had been in physical possession of the consignment, the position would have been different. In the case with which we are now dealing the petitioner came into physical possession of the consignment as soon as he took delivery thereof at the railway station and from the moment that he took such delivery until the goods were actually exposed for sale in his shop there can be no doubt that he was actually storing them with a view to their ultimate disposal by sale.

It is argued that it would be unreasonable to convict the petitioner in this case in view of the fact that he could have had no opportunity to examine the nature of the goods between the time when he took delivery of them and the time when a sample was taken. This argument is, however, answered by sub-section (3) of section 6 of the Act which is in the following terms: "In any prosecution under this section it shall be no defence to allege that the vendor, manufacturer or storer was ignorant of the nature, substance or quality of the article sold, exposed for sale, or manufactured or stored for sale by him". In cases of this nature it is obviously

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necessary that all dealers and consignees of goods such as those which are mentioned in section 6 of the Act should exercise greatest caution as to the persons with whom they deal. In my view, the petitioner has been properly convicted, but if he considers that he has a grievance against the person who supplied him with these goods, it will be for him, if so advised, to consider the propriety of instituting a suit for damages against that person.

This Rule must, accordingly, be discharged and the decision of the learned Magistrate is affirmed.

A. T. M. *Rule discharged.*

APPELLATE CRIMINAL

Before Mr. Justice C. Bartley and Mr. Justice A. N. Sen.

MUJJAFFAR SHAIKH AND ANOTHER

v.

THE EMPEROR.*

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May, 3.

Misdirection—Charge to jury—Circumstantial evidence—Indian Penal Code (Act XLV of 1860), sections 34, 149—Duty of Judge in placing evidence before jury.

A Judge should give adequate directions to the jury as to how they should deal with a case in which the guilt of the accused is sought to be established by the circumstantial evidence.

The Judge should tell the jury that if the circumstances were capable of a reasonable interpretation consistent with the innocence of the accused, then the accused was entitled to be acquitted even if the circumstances raised a strong suspicion against him. He should summarise the circumstances alleged against the accused and ask the jury to decide whether from these circumstances the only reasonable inference to be drawn was the guilt of the accused and should tell them that if that was not the reasonable inference, they should acquit the accused.

The Judge in his charge to the jury should not say "This is evidence against the accused. Do you think that he has been falsely implicated?" But state

* Criminal Appeal No. 223 of 1940 with Reference under section 374 of the Code of Criminal Procedure, against the decision of M. A. Ispahani, Esq., Sessions Judge of Birbhum, dated 5th April, 1940.

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" Were the jury in doubt as to whether the case is false or true, they should give the accused the benefit of that doubt. "

In order to make a person constructively liable with the aid of section 34 of the Indian Penal Code for an offence not actually committed by him, it must always be shown that the person so sought to be made liable had the intention requisite for the constitution of that particular offence.

Section 149 of the Indian Penal Code cannot come into operation unless there is an unlawful assembly and an unlawful assembly requires the participation of five persons.

A Judge should in placing the evidence before the jury point out the inherent improbability, inconsistencies and important contradictions in the evidence.

Appeal by the Accused and Reference under section 374 of the Code of Criminal Procedure.

The material facts appear from the judgment.

Messrs. J. P. Mitter and *Bireswar Chatterjee* for the Appellants.

Mr. Satindra Nath Mukherjee for the Crown.

May, 3.

Sen, J. :—Panchkari Shaikh and his two sons—Mujjaffar Shaikh and Saifar Shaikh were tried for the murder of one Abdul Rashid by the Sessions Judge of Birbhum and a special jury. By a unanimous verdict the jury found Panchkari not guilty and by a majority of 5 to 4, they found Mujjaffar Shaikh and Saifar Shaikh guilty of committing murder. The learned Judge accepting the verdict of the jury, acquitted Panchkari and sentenced Mujjaffar and Saifar to death ; he has referred the case to us for confirmation of the sentence.

Mujjaffar and Saifar have appealed.

The case for the prosecution, briefly is as follows :—

Panchkari and his two sons Mujjafar and Saifar were on bad terms with the deceased Abdul Rashid who is the son of Panchkari's sister. About 6 months before the murder, the three accused were sent up on a charge of theft and Abdul Rashid helped the Police against them. This led to further ill-feeling between the parties. On the 2nd of November, 1939, Rashid lodged an information at the Thana complaining that the three accused persons and one Nabuat had been threatening him with bodily harm. On the 16th of January, 1940, in the morning there was a *Salis* regarding a dispute between Panchkari and his brother Ekrar, over a wall. At this *Salis* Rashid and his brother attended and there Panchkari said that both the brothers should not be allowed to take part in the *Salis* and threatened them saying that they should be " removed from this world."

On the same day Rashid left the Co-operative Bank at Rampurhat where he works at about 5-15 P. M. with one Mir Najim Ali. They were returning home after their work. They first went to a cloth shop where Rashid purchased some cloth and thereafter departed—Rashid going homeward to his village of Binodepur on a bicycle. He was seen by some persons riding towards the village. Now, to go to his village from Rampurhat one must pass a culvert called Hiranbandi culvert. Rashid was last seen at about 5-40 P.M by one Roshan Ali, P. W. 10 riding on his bicycle about a mile from the culvert. On that day at about 6 P. M. certain persons saw a bicycle lying on the embankment near the culvert about 80 cubits away. They also saw the appellants and another man who looked like Panchkari near about this place. Nothing further was seen of Rashid or of his bicycle on that day. On the next morning at about 7 A. M. certain persons walking along the road saw a corpse in a ditch near the culvert and this corpse was that of Rashid. Nearby there was a bicycle and near the bicycle was the blade of a clasp knife. Later on in the ditch the brass handle of this knife was found. The Police were informed, they came on the scene and took charge of the corpse and after investigation sent up the appellants and Panchkari for trial on a charge of murder.

The medical evidence shows that death was due to a punctured wound 3½" x 1" on the neck. The wound penetrated deep down to the thyroid cartilege and the carotoid artery was cut. There were other injuries on the face, forearm and finger.

The case against the appellants rests entirely upon circumstantial evidence. I propose to set forth the main incriminating facts upon which the prosecution depends. They may be stated thus:—

(a) There was ill-feeling between the parties and on the 16th of January, 1940 there was a threat by Panchkari that the deceased should be " removed from this world." This threat is spoken to by the brother of the deceased Abdul Hamid, P. W. 13, Abdul Kadar, P. W. 18, also speaks to the fact that Panchkari or Saifar spoke in a threatening manner but his evidence does not corroborate that of Abdul Hamid regarding the actual words used.

(b) The presence of Mujjaffar and Saifar and a person who looked like Panchkari near about the culvert on the 16th of January, 1940, at about 6-15 P. M.. This fact is spoken to by Kumarish Let, P. W. 2, Gopal Bannerjee, P. W. 20, Upendra Muchi, P. W. 25, Mokram Hossain, P. W. 26 and Kasim Sheik, P. W. 27. The evidence is that Mujjaffar was loitering about near the culvert and the other two persons seemed to be pressing something down in the

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ditch. One of the witnesses also says that he saw Saifar running away. This is Mokram Hossain P. W. 26.

(c) On that day Mujjafar was late in attending the dispensary where he worked and when he got there he opened an almirah and took out some iodine without the permission of the person in charge. He applied the iodine to some injuries on his person without showing them to anybody there. The medical evidence shows that there were two slight injuries on Mujjaffar, one was a scratch on the right cheek and the other, an abrasion on his right hand.

(d) The conduct of Mujjaffar on the day following the murder: On the 17th of January, 1940, certain persons saw the corpse of Rashid in the ditch. Mujjaffar was accompanying some of these persons. They saw the handle of a knife lying near the bicycle. Mujjaffar picked up this handle and threw it into the ditch. When the witnesses asked Mujjaffar why he was doing this, Mujjaffar merely said "it does not matter".

(e) When Abdul Hamid, the brother of the deceased, after hearing that his brother's corpse had been found, was going towards the culvert, Mujjaffar came up to him and tried to dissuade him from going there saying "I passed by the place. It is all false to say that there has been a murder."

(f) The knife found at the place is said to belong to Saifar. This is spoken to by two witnesses, namely, Ali Akbar, P. W. 17 and Osman, P. W. 32.

(g) Saifar was seen on the morning after the murder wearing a Dhoti with blood-stains in front. This was seen by two persons, namely, Kalu P. W. 23, and Abdul Sattar, P. W. 24. They say that when Saifar's attention was drawn to this blood stain he hurriedly went to his house, changed the Dhoti and reappeared in a Sari. These are the main facts upon which the prosecution depends.

The defence of the accused is that Rashid was carrying on an intrigue with the daughter of a Muchi and that some one had killed him in that connection. It was suggested that the witnesses were implicating them because of previous enmity.

I shall now deal with the Judge's charge to the jury. In my opinion the charge is unsatisfactory in several respects. The learned Judge has not given adequate directions to the jury as to how they should deal with a case in which the guilt of the accused is sought to be established by the circumstantial evidence. This is what the learned Judge says:—

"Circumstantial evidence means the evidence afforded not by the direct testimony of an eye-witness to the fact to be proved, but

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by the bearing upon that fact of other facts which are relied upon as inconsistent with any result other than truth of the principal fact."

A theoretical discourse like this of what is circumstantial evidence couched in language which must have been unintelligible to a muffasil jury is in my opinion quite worthless. The learned Judge should have told the jury that if the circumstances were capable of a reasonable interpretation consistent with the innocence of the accused, then the accused were entitled to be acquitted even if the circumstances raised a strong suspicion against them. He should have summarised the circumstances alleged against the accused and asked the jury to decide whether from these circumstances the only reasonable inference to be drawn was the guilt of the accused and should have told them that if that was not the only reasonable inference, they should acquit the accused. Nothing of this kind was done. After giving this definition of circumstantial evidence and after telling the jury that they had to arrive at a decision on circumstantial evidence the learned Judge concludes thus :

"You should therefore consider whether you are prepared to accept the same as showing the guilt of the accused person".

These directions in a case depending on circumstantial evidence are in my opinion quite inadequate.

The next defect in the charge is this : The learned Judge summarises the evidence against each of the accused persons and at the end of each summary he makes the following observation

"This is the evidence against the accused. Do you think that he has been falsely implicated?"

He uses these very words three times at the end of each summary. This is a wrong method of approach in a criminal case. The issue before the jury was not whether the prosecution had proved beyond reasonable doubt that the accused were guilty. A question like this repeated at intervals at the end of the summary of the evidence against each of the accused is very likely to misguide the jury into thinking that unless they were satisfied that the case was false, they should find the accused guilty. The wholesome principle is that were the jury in doubt as to whether the case is false or true, they should give the accused the benefit of that doubt, seems to have been lost sight of by the learned Judge when he put this wrong issue before the jury.

Again the learned Judge was wrong in his treatment of the

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application of section 34 of the Indian Penal Code to this case. This is what he says:

"I shall explain to you what section 34 Indian Penal Code means. Under this section where parties go with a common purpose to execute a common object, each and every one becomes responsible for the acts of each and every other in execution and furtherance of their common purpose. As the purpose is common so must be the responsibility".

Now this is not a proper explanation of the provisions of section 34 of the Indian Penal Code. This passage in the learned Judge's charge is a verbatim reproduction of a passage to be found in the notes under section 34 of the Indian Penal Code in Ratanlal's Law of Crimes, 11th Edition, page 61. The author in making this comment refers to the case of *Ganesh Sing* v. *Ram Raja* (1). I have consulted the case and I find that the learned author has quoted a passage from the judgment of their Lordships of the Privy Council at pages 45 and 46. Now this case has nothing whatsoever to do with section 34 of the Indian Penal Code. It was not a criminal case at all. Their Lordships were dealing with a suit for damages instituted against several persons who were alleged to have plundered the property of the plaintiff at the time of the mutiny. They said that each of the plunderers was liable to pay damages and that damages should not be apportioned, inasmuch as each of the plunderers had the common purpose of plunder. Their Lordships went on to say that the position would be different if it were a criminal case. It is sometimes dangerous to accept as accurate, notes appearing in text books. It is always safer to refer to the decision itself on which the note is based. The note relied upon by the learned Judge and incorporated by him in his charge is entirely misleading and inaccurate and I have no doubt that the jury were misled by this direction of the learned Judge. In my opinion it is quite wrong to say that if several persons have a common purpose, each person will be liable for every act done by the other in furtherance of that common purpose. For instance, three persons may have the common purpose of robbing a bank, one of these persons, unknown to the others, arms himself with a pistol and shoots one of the bank's assistants who resisted him. The others will certainly not be liable for murder unless it is proved that all of them had the common intention that any one who resisted them would be shot. In the present case section 34 of the Indian Penal Code would not apply,

(1) (1869) 3 B. L. R. (P. C.) 44 (45).

unless it would be established that Mujjafar and Saifar had the common intention of murdering Rashid. The learned Judge should have made this clear to the jury. In fact he should have told the jury that unless it could be proved beyond all reasonable doubt that Mujjaffar and Saifar both had the common intention of killing Rashid, nether could be found guilty of murder, as there is no evidence to show who actually struck the deceased. This is the fundamental weakness in the case for the prosecution and the learned Judge seems to have overlooked it.

In order to make a person constructively liable with the aid of Section 34 of the Indian Penal Code for an offence not actually committed by him, it must always be shown that the person so sought to be made liable had the intention requisite for the constitution of that particular offence. Thus to make him constructively liable under Section 34 of the Indian Penal Code for murder it must be proved that he had the intention of committing murder in common with the person or persons who actually committed the murder and who were his companions in the joint criminal act or enterprise. Unless this intention is proved he cannot be made liable under the aforesaid section even though the murder be committed in order to accomplish some other object or purpose shared in common. Under Section 149 of the Indian Penal Code the position would be different. That section runs thus:

"If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

Section 34 of the Indian Penal Code, deals with quite another set of circumstances. That section runs thus:

"When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone."

The provision of Section 149 of the Code cannot be availed of in this case, inasmuch as the number of the persons involved was less than five. Section 149 cannot come into operation unless there is an unlawful assembly and an unlawful assembly requires the participation of five persons.

Another defect in the learned Judge's charge to the jury is that in placing the evidence before them he does not point out,

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as he should have done, the inherent improbabilities, inconsistencies and important contradictions in the evidence.

There is no doubt that there was ill-feeling between the accused and the deceased. This is amply proved and indeed it is admitted but the evidence regarding the threats used by the accused against the deceased on the morning of the 16th of January is contradictory. As I have said before, the two witnesses who proved this part of the case are—Abdul Hamid, the brother of the deceased, and Abdul Kadir, President of the Union Board. Now Abdul Hamid says that Panchkari said that the brothers should be removed from this world. The President of the Union Board does not say anything of the kind. He says this: "Either Panchkari or Saifar said, 'Why you should not be taken as an arbitrator, both of you will be taken.' It seemed to me that was said in a threatening manner." Now, this discrepancy in the evidence was not pointed out by the learned Judge to the jury. He merely told the jury that these two witnesses gave evidence to show that there was a threat on the morning of the day on which this incident took place.

The story about Mujjaffar's activities both before and after the murder seems to me to be highly improbable. First, he loitered about on the scene of the murder. It is difficult to understand why he should be loitering about after committing the murder. One would expect that he would commit the murder and disappear as quickly as he could. It is suggested that he was there together with others in order to conceal the body of the deceased. Evidence was given to the effect that Saifar and the man who looked like Panchkari were pushing something down in the ditch. Now, the Sub-Inspector, who came the next day and saw the body, says that it did not seem to him that any attempt had been made to conceal the body. The water in the ditch was only 8" deep. There were no signs of dragging. It seems to me that the story that Mujjaffar, Saifar and a third person were loitering about the place, is not one which can be easily accepted. This aspect of the evidence was not properly placed before the jury by the learned Judge.

Again, the evidence is that Mujjaffar accompanied the witnesses on the next day to the spot, where the body was lying and seeing a knife handle lying near the body he picked it up and threw it into the ditch in the presence of all the witnesses, when asked why he was destroying evidence, he said, "It matters little." A little later when he sees Abdul Hamid brother of the deceased,

crying and going towards the corpse, he tried to prevent him from going there and tells him a palpable and pointless lie that there has been no murder. I find it extremely difficult to believe that any murderer would behave in this foolish fashion and go about creating evidence against himself. This view was not placed before the jury.

Next, we have the evidence that Saifar was seen the day after the murder with blood marks in front of his *dhooti*. This also seems to me to be improbable. It is not likely that a murderer who had taken precautions to remove all traces of the murder and had the whole night in which to remove the traces of murder would reappear in the morning with blood-stains in front of his *dhooti*. It should be remembered in this connection that there was no *dhooti* with any blood-stain seized by the Police from the house of Saifar. All this was not put before the jury.

The story about the knife has also not been properly dealt with by the learned Judge. We have seen the knife and we find that there are no distinguishing marks on it. It is a country-made clasp knife with a brass handle. Witness No. 17, Ali Akbar says that he borrowed this knife on a single occasion about a month before the occurrence. I find it difficult to believe that this word would afford him sufficient opportunity of being able to identify a knife of this description as being the very knife that he had borrowed. The learned Judge does not deal with this aspect of the evidence at all. I would point out in this connection that this witness had the hardihood to identify the blade separately as being the blade of the knife which he had borrowed from Saifar. The other witness on this point is witness No. 32 Osman, who says that he used this knife of Saifar on 5 or 6 occasions. I might incidentally mention that the learned Judge in dealing with this part of the evidence made an error when he told the jury that both these witnesses had used the knife on 5 or 6 occasions. The evidence further is that knives like this were hawked about in the village. It is quite possible that other villagers would have knives like this. In my opinion the evidence regarding the knife is not of any value.

The circumstantial evidence in this case is not such as to leave one no alternative but to hold that the appellants are guilty. Again the circumstances do not establish which person struck the blow. As I have pointed out before, there is a great difficulty in the way of the prosecution invoking the aid of Section 34 of the Indian Penal Code in this case, as it has not been established either by

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the direct or circumstantial evidence that both the appellants intended to kill Rashid. Even if one were to take a view unduly favourable to the prosecution in this case, the most that one could say was that one or other of the accused must have killed Rashid. There is no evidence to show that both of them killed him or that both had the intention to kill him. That being so, obviously neither can be found guilty of the murder.

We, therefore, set aside the order of conviction and sentence. In the circumstances of this case we do not think any useful purpose will be served in ordering a retrial. We accordingly acquit the appellants and direct that they be set at liberty forthwith.

The appeal is allowed and the Reference is rejected.

Bartley, J. :—I agree.

A. T. M. *Appeal allowed : Reference rejected.*

Before Mr. Justice N. A. Khundkar and Mr. Justice R. F. Lodge.

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1940.

July, 4, 5, 8, 15.

ANIL KUMAR DAS AND ANOTHER

v.

SRIMATI PROBHABATI MITRA.*

Mortgage—Guardian, execution by—Recitals as to necessity in mortgage deed—True necessity not stated—Guardians and Wards Act (VIII of 1890), sections 29, 30—Borrowing of money by guardian—Application of money.

The recitals in the mortgage deed executed by the guardian of a minor as to necessity is a piece of evidence as to the nature of the alleged necessity ; they are not conclusive on the point. If it is proved that the mortgagee did in fact make inquiries and satisfy himself as to the legal necessity, the fact that the true necessity was not mentioned in the recitals is of little importance.

* Appeal from Appellate Decree No 1387 of 1939, against the decree of U. N. Chatterjee Esq., Additional District Judge of Khulna, dated the 21st December, 1938, reversing that of Biman Behari Sarkar, Esq., Subordinate Judge, Khulna, dated the 10th August, 1936.

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Money borrowed to improve the finances of a business may in certain circumstances be considered as borrowed for the benefit of the minor's estate.

Hemraj Dattubuva Mahnubhao v. *Nathu* (1) distinguished.

Restrictions contained in section 29 of the Guardian and Wards Act, 1890 and the provisions of section 30 do not apply to a mere borrowing of money by a guardian.

If the mortgagee proves that he made adequate enquiries and satisfied himself as to the necessity for a loan, he need not prove that the money was actually expended for the benefit of the minor's property.

Hunooman Persaud Panday v. *Mussamat Babooee Munraj Koonwaree* (2) followed.

Appeal by Defendants.

Suit to enforce mortgage.

The material facts appear from the judgment.

Messrs. Prokas Chandra Mallik and *Provansu Kumar Mallik* for the Appellants.

Messrs. Gopendra Nath Das and *Sambhu Nath Banerjee (Sr)* for the Respondent.

C. A. V.

The following judgments were delivered:

Lodge, J.:—This second appeal arises out of a suit on a mortgage bond. The material facts are as follows: One Akshoy Kumar Das died in the year 1925, leaving him surviving a widow and three sons. The eldest son Satish Chandra Das was the son of a predeceased wife; the other two sons—Anil Kumar Das and Sudhir Kumar Das were the children of the widow Binodini Dassi. *July, 8.*

The property left by Akshoy Kumar Das consisted of a dwelling house in the town of Khulna and a stationery business which was being carried on under the name of 'Das Brothers' and was being managed by the eldest son Satish.

On the 4th January, 1933, the widow Binodini Dassi applied to the District Judge of Khulna to be appointed guardian of the persons and properties of her two minor sons Anil Kumar and Sudhir Kumar, and on the 26th January, 1933, an order was passed allowing her application and directing her to furnish security. Security was duly furnished. The security bond was tested by the Nazir and on 11th February, 1933, an order was passed by the District Judge accepting the security and directing the drawing up of a formal order of appointment.

(1) (1935) I. L. R. 59 Bom. 525.
(2) (1856) 6 M. I. A. 393.

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Three days later, on the 14th February, 1933, Binodini Dassi applied to the District Judge for sanction to the raising of a loan of Rs. 2000 by mortgaging the undivided 2/3 rd share of the minors in the dwelling house, the purpose of the loan being to increase the capital of the stationery business. The learned District Judge directed that the application be put up in the presence of the pleader on 16th February and on the latter date, after hearing the pleader of the guardian passed an order that the application would be considered on further security being furnished.

While this matter was still pending, on 21st February, 1933, Binodini Dassi executed a mortgage bond in favour of the plaintiffs in respect of the undivided 2/3rd share of the minors in the dwelling house and purporting to be in consideration of a loan of Rs. 1500.

In the recitals in the bond, it was stated that the money was needed for the education of the minors and for payment of debts incurred by their father. After this transaction was completed, Binodini Dassi seems to have taken no further steps in the matter of furnishing fresh security as directed by the District Judge on 16th February, 1933, with the result that on the 18th March, 1933, or nearly a month after the mortgage executed in favour of the plaintiff, her application for permission to mortgage the minors' property was refused by the learned District Judge on the sole ground that the guardian had failed to furnish additional security. Plaintiff instituted a suit on the mortgage bond against the minors. Binodini Dassi had already been discharged from guardianship at her own request, and the minors were represented in the suit by a pleader guardian appointed by the Court.

The defendants contested the suit, alleging

(1) that the mortgage bond had not been executed by their mother Binodini Dassi ;

(2) that there was no passing of consideration ;

(3) that there was no legal necessity for the loan ;

(4) that if it were found that there was passing of consideration, the money received was not expended for the benefit of the minors ; and

(5) that the mortgage was voidable at the instance of the minors inasmuch as no sanction of the same had been obtained from the District Judge.

The trial Court dismissed the suit holding that though the bond was duly executed and registered by Binodini Dassi, there was no

proof of the passing of consideration. The decision of the trial Court was reversed in appeal, but on second appeal to this Court, the decision of the Lower Appellate Court was set aside and the appeal remanded for further hearing, with a direction as to the manner in which the evidence should be considered.

On a rehearing of the appeal the Lower Appellate Court came to the following conclusions, namely—

(1) that the sum of Rs. 1500 was paid to Binodini Dassi at Khulna as consideration ;

(2) that the plaintiff had made proper enquiries and had satisfied herself that there was legal necessity for the loan ;

(3) that the money had actually been spent for the benefit of the minors; but

(4) that as no sanction for the mortgage had been obtained from the District Judge, plaintiff was entitled only to a simple money decree.

The defendants have again appealed to this Court.

The learned Advocate for the appellants has contended that the learned Lower Appellate Court ignored material discrepancies in the evidence as to the passing of consideration and that consequently the finding on that issue cannot be accepted; that the learned Lower Appellate Court was wrong in holding that the plaintiff made adequate enquiries as to the necessity for the loan ; that the learned Lower Appellate Court was wrong in holding that there was any legal necessity for the loan ; that the learned Lower Appellate Court misunderstood the evidence on which reliance was placed to prove that money was actually spent for the benefit of the minors and that there was no evidence whatever to shew that the money was so spent, and lastly that the law on the subject of a guardian's powers to contract loans without the sanction of the Court had been misunderstood and misapplied by the learned Lower Appellate Court.

These contentions will be considered *seriatim*. The learned Lower Appellate Court has found as a fact that the money was actually paid to the defendant at her house in Khulna. The husband of the plaintiff and one other witness deposed to this effect.

It appears that in a previous suit, the plaintiff at one stage had stated that the money was paid not to defendant but to Satish Chandra Das at Howrah Station. Further, at one place in his evidence in this Court, the husband of the plaintiff also stated that the money was paid at Howrah.

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The learned Lower Appellate Court discussed the previous evidence of the plaintiff and gave his reasons for not attaching any value to this discrepancy, but he did not refer directly to the contradictory evidence given by the husband of the plaintiff. We have been asked to hold that in the circumstances the learned Lower Appellate Court's finding of fact should not be accepted. We are unable to take such a view. There was positive evidence on record which, if believed, was sufficient to justify the finding. The mere fact that the learned Lower Appellate Court did not refer in his judgment to a particular contradiction does not justify us in rejecting his finding, more especially as a similar contradiction was in fact considered and explained.

The evidence on record shows that plaintiff had enquiries made in Khulna as to the necessity for the loan and learned of the application for sanction to the District Judge. She also learned that the stationery business had declined and that the guardian Binodini was going from door to door begging for a loan.

The order passed by the learned District Judge on the application for sanction was such as to justify any one in thinking that sanction was being withheld merely until additional security was furnished ; in other words, that the District Judge was satisfied as to the necessity for the loan.

In our opinion, in the circumstances of the case the learned Lower Appellate Court had materials on which to come to the conclusion that adequate enquiries were made. The learned Advocate for the appellants has pointed out that the necessity for the loan as set out in the application to the District Judge was different from the necessity as set out in the recitals in the mortgage bond, and he has further pointed out that the necessity as set out in the recitals in the bond has not been found established by the learned Lower Appellate Court. He argued that the plaintiff ought not to be allowed to prove any necessity other than that recited in the bond, and that consequently the Court should have held that no legal necessity had been proved.

We are unable to accept this view, and we consider that if it is proved that the plaintiff did in fact make enquiries and satisfy herself as to the existence of legal necessity, the fact that the true necessity was not mentioned in the recitals is of little importance. The recitals in the bond are merely a piece of evidence as to the nature of the alleged necessity ; they are not conclusive on the point.

The learned Advocate has further contended that augmenting

the capital of the stationery shop could not be regarded as a legal necessity for a loan, and has referred in this connection to the case of *Hemraj Dattubuva Mahnubhao* v. *Nathu* (1).

In that case the meanieg of the phrase "benefit of the estate" which was the test applied in the case of *Hunoomanpersaud Panday* v. *Mussamat Babooee Munraj Koonweree* (2) was considered. The decision was that the phrase cannot be clearly defined and that though it may include transactions which are not of a character to protect or preserve property of a minor, it would in general be difficult to justify transactions which are not of such a character. The actual decision in that case was merely that a guardian of a Hindu minor was not entitled to alienate immoveable property belonging to the minor simply on the ground that a very good price could be obtained for it.

In the present case the findings of fact are that stationery business was inherited from the father of the minors, and that the income from it was the principal source of maintenance of the minors. The further finding is that more money was needed for the efficient conduct of that business. In the circumstances we are unable to hold that money borrowed to improve the finances of the business was not money borrowed for the benefit of the minors' estate.

In considering whether the money borrowed was actually spent for the benefit of the minors, the learned Lower Appellate Court relied on the statement of the assets of the minors furnished by their mother in her application for guardianship, and on a subsequent statement filed by the guardian when submitting accounts. The learned Judge omitted to notice that the second of these statements referred to the value of the assets at beginning of Magh, 1339, i. e. date earlier than the date on which consideration for the mortgage passed. If there was in fact any increase in the assets between the dates referred to in the two statements, that increase could not have been the result of this particular loan. As there was no other evidence on which to base the finding, we agree with the learned Advocate for the appellants in holding that there is no evidence whatever to prove that the money was actually spent for the benefit of the minors.

In remanding the appeal for rehearing, the learned Judges of this Court observed—"It is necessary to determine after carefully

(1) (1935) I. L. R. 59 Bom. 525.
(2) (1856) 6 M. I. A. 393.

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considering the evidence, in the first place whether the plaintiff made proper enquiries as mentioned above (i. e. as to the existence of necessity justifying the mortgage) and in the second place, if she fails on this point, whether the money was applied for the benefit of the minors".

This observation clearly indicates that the view then taken was that plaintiff was entitled to succeed if it was proved that she had made proper enquiries and had satisfied herself as to the legal necessity for the mortgage, whether the money was actually applied for the benefit of the minors or not. The learned Advocate for the appellants has argued that this is not a correct view of the law, and he has contended that when a guardian has been appointed under the Guardians and Wards Act, a lender must prove not merely that due enquiry was made but that the money was in fact applied for the benefit of the minor.

In support of his view the learned Advocate referred to a number of reported cases, in all of which the facts were essentially different from those of the present case. The only case referred to by the learned Advocate, in which a loan as distinct from an alienation of immoveable property, was considered was the case of *Upendra Nath Biswas* v. *Shib Kumari Debi* (1).

It should be noted that under section 27 of the Guardians and Wards Act, a guardian may, subject to the provision of the Act, do all acts which are reasonable and proper for the realisation, protection or benefit of the property. Other sections in the Act place restrictions on the guardian's power to alienate or charge the immoveable property of the minor. It follows that the restrictions contained in section 29 of the Act and the provisions of section 30 do not apply to a mere borrowing of money by a guardian.

In the case of *Upendra Nath Biswas* v. *Shib Kumari Debi* (1), this Court was asked to consider the effect of the transaction treated as a simple loan and not as a mortgage, but the Court declined to do so on the ground that there was no case made out of any enquiry as to the legal necessity for incurring a debt.

The leading case on this question is still that of *Hunoomanpersaud Panday* v. *Mussamat Babooee Munraj Koonweree* (2). In the head note of that report occurs the following passage: "A lender is bound to enquire into the necessities of the loan;

(1) (1918) 23 C. W. N. 634.
(2) (1856) 6 M. I. A. 393.

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and to satisfy himself as well as he can with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. If he does enquire and acts honestly the real existence of an alleged and reasonably credited necessity is not a condition precedent to the validity of his charge which renders him bound to see to the application of the money."

This view has been consistently followed by the Courts in India, for an example see *Dalibai* v. *Gopibai* (1). We have no hesitation therefore in holding that the view indicated in the order of remand was the correct view, and that if a plaintiff succeeds in proving that he made adequate enquiries and satisfied himself as to the necessity for a loan, he need not prove that the money was actually expended for the benefit of the minor's property.

In the result we are of opinion that the findings of fact properly arrived at by the learned Lower Appellate Court are sufficient to justify the order passed by him. The appeal accordingly fails and is dismissed with costs.

Khundkar, J. :—I agree.

July, 15.

Lodge, J. :—In accordance with the provisions of Order XXXIII, rule II of the Code of Civil Procedure we order the appellants to pay court fees amounting to Rs. 195 being the amount payable on the memorandum of appeal to this Court.

Let a copy of the decree be forwarded to the Collector.

Khundkar, J. :—I agree.

A. T. M. *Appeal dismissed.*

(1) (1902) I. L. R. 26 Bom. 433.

FEDERAL COURT.

PRESENT : *Sir Maurice Gwyer, Knight, Chief Justice, Justice Sir S. M. Sulaiman and Mr. Justice S. Varadachariar.*

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December, 6.

THE UNITED PROVINCES

v.

MST. ATIQA BEGUM AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT ALLAHABAD.]

Ultra vires—*Regularisation of Remissions Act (U. P. Act XIV of 1938), validity of—Appeal by Province, if lies—Province, if can be made a party in second appeal—Civil Procedure Code (Act V of 1908), sections 107(2), 151, order 1 rule 10, order 41 rule 20, order 42—Inherent power—Justice and convenience—No appeal to Federal Court by any of the parties—Constitution Act, section 292—Retrospective effect to new provision—"With respect to any of the matters" enumerated in List II or List III Schedule VII of the Constitution Act—Entry in No. 21 of List II, interpretation of—"Remission of rent"—Regularisation of Remissions Act, section 2—Civil Procedure Code, sections 4, 9—Constitution Act, section 299(3)—Retrospective operation, if applicable to pending action—Statutes, interpretation of—Decree*

Per Curiam: The High Court has jurisdiction in second appeal to implead the United Province on its application as party to the appeal between private persons when the validity or constitutionality of the provincial legislation is in issue and as such party it can prefer an appeal to the Federal Court (in the absence of any appeal by the parties).

The Regularization of Remissions Act, 1938 was within the sphere allotted to the Provincial Legislature by the Government of India Act, 1935, it was not opposed to section 292 of the said Act of 1935 and was ***intra vires*** of the United Provinces Legislature.

Per Sulaiman, J.: The Regularization of Remissions Act, 1938 does not apply to the appeal pending before the High Court.

Per Curiam: As the United Provinces was the only appellant and was not interested in any way in the original dispute between the parties, save to uphold the validity of a particular law which had been challenged in the course of the proceedings, the Federal Court at the instance of third party who had no direct interest in the original suit, to order the High Court to vary the decree which it gave as between plaintiffs and defendant.

Per C. J.: The learned C. J. was of opinion that the party should not have been the Province itself; that if the Government of the Province desired to uphold the validity of a Provincial Act or to challenge that of a Federal Act, it

should direct the Advocate-General of the Province to intervene on its behalf and as intervenor it could not appeal to the Federal Court.

Attorney-General of Alberta (Intervenor) v. *Kazakewich* (1) followed.

The Advocate-General of the Province is a proper party in the sense that without him the Court cannot effectually and completely adjudicate upon and settle all the questions as to validity of impugned Act involved in the suit.

Esquimalt and Nanaimo Railway Company v. *Wilson* (2) followed.

Per Sulaiman, J.: When in a suit between a landlord and his tenant, the validity of an Act of the Provincial Legislature is in question, the Provincial Government is a proper party to be impleaded as his presence is necessary for an effectual or complete adjudication, though indirectly interested in such an adjudication and the Government were interested to the further extent that the effect of the High Court's ruling would be to nullify certain orders previously issued by the Government, the enforceability of which was indirectly attempted by the U. P. Regularization of Remissions Act.

Order 41 Rule 20 Civil Procedure Code, 1908, is not exclusive or exhaustive and does not deprive a Court of any inherent power which it may possess and can exercise in special circumstances, and which has been saved by section 151 of the said Code.

Per Varadachariar, J.: When a question as to making United Provinces party to the appeal is raised, it must be decided on broad grounds of justice and convenience and not merely as turning on the interpretation of a particular rule in the Civil Procedure Code.

Per C. J.: Within their own sphere the powers of the Indian Legislatures are as large and ample as those of the Parliament itself: *The Queen* v. *Burah* (3). The burden of proving that they are subject to prohibition against retrospective legislation lies upon those who assert it.

Per C. J. & Sulaiman, J.: There is nothing in section 292 of the Government of India Act, 1935, which debars the Central or a Provincial Legislature, which has altered, repealed or amended a previously existing law, from giving the new provision a retrospective effect from dates earlier than when the Act is passed.

The Regularization of Remissions Act, 1938 did not repeal, alter or amend the provisions of the law contained in section 73 of the Agra Tenancy Act.

Per Sulaiman, J.: The Regularization of Remissions Act, 1938 attempted to widen the scope of section 74(1) of the Agra Tenancy Act without embodying anything like the provisions of section 74(2). It has merely created a further bar which completely restricts a civil right to challenge it under section 9 of the Code of Civil Procedure.

Per Varadachariar, J.: The remission which the Regularization of Remissions Act, 1938 sought to regularize was not made in conformity with the provisions of section 73 of Agra Tenancy Act of 1926. But such regularization only means the addition of a new head of remission; it may amount to an alteration or amendment of the old Act, but will not necessarily involve a repeal of section 73.

(1) (1937) Can. S. C. R. 427. (2) [1920] A. C. 358 (363).
(3) (1878) 3 App. Cas. 889; L. R. 5 I. A. 178; I. L. R. 4 Calc. 172.

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Per C. J.: In enacting the Regularization of Remissions Act, 1938, the Legislature legislated with respect to matters covered by item No. 21 in List II of Schedule VII of the Government of India Act, 1935. Legislation with respect to remission of rents is legislation with respect to a matter included in item No. 21.

The subject dealt with in the three Legislative Lists are not always set out with scientific definition. None of the items in the Lists is to be read in a narrow or restricted sense, and each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it.

Attempt to enumerate in advance all the matters which are to be included under any of the more general descriptions deprecated.

Per Sulaiman, J.: The three Lists even if taken together may not prove to be absolutely exhaustive. But the Lists are so comprehensive that apart from personal laws it would be only extremely rare cases which would not be covered by them all.

Entry No. 21 in List II must be given a liberal interpretation so as to invest Provincial Legislature with full power to legislate with respect to them, so long as such legislation does not conflict with any other provision.

In pith and substance the Regularization of Remissions Act, 1938, is an Act not only with respect to the relation of landlord and tenant or the collection of rents, but is also with respect to conferring on the Provincial Government very extensive powers of interference with the legal rights of land-holders within the exclusive authority of the Provincial Legislation.

Per C. J.: The Regularization of Remissions Act, 1938, is with respect to remission of rents, although it may be an Act with respect to something else, that is to say, the validation of doubtful executive orders. Legislation for validation of executive orders is subsidiary or ancillary to the power of legislating on the particular subjects in respect of which the executive orders may have been issued.

Per Sulaiman, J.: It is an Act not only with respect to the relation of landlord and tenant or the collection of rents, but also with respect to conferring on the Provincial-Government very exclusive powers of interference with the legal rights of land-holders in their lands. This comes within No. 21 of List II. Even if the impugned Act were indirectly with respect to assessment of revenue, it will fall within entry No. 39 and be still in List II.

Per Varadachariar, J.: Section 2 of the impugned Act had a two-fold operation: on the one hand it prevented the landlord from questioning the order of remission with a view to receiving the full rent; on the other, it might also be held to prevent the Court *suo motu* from questioning the order of remission.

Per C J. & Sulaiman, J.: As assent of the Governor was later given, the Regularization of Remissions Act, 1938 is not void under section 299(3) of the Government of India Act, 1935.

Per C. J.: The Regularization of Remissions Act, 1938, is not in conflict with sections 4 and 9 of the Code of Civil Procedure.

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Per Sulaiman, J.: Even if there were mere repugnancy, the impugned Act would under section 107(1) of the Constitution Act be void only to the extent of repugnancy. Section 9 of the Code of Civil Procedure cannot stand in the way of its applicability to a revenue case.

The impugned Act not being repugnant to any of the provisions of the Code of Civil Procedure, it does not fall under entries Nos. 4 and 15 of List III, Schedule VII of the Constitution Act.

Per Sulaiman, J.: An Act may in its operation be retrospective, and yet the extent of its retrospective character need not extend so far as to affect pending suits. Courts have leaned very strongly against applying a new Act to a pending action, when the language of the statute does not compel them to do so.

The statutes should, as far as possible, be so interpreted as not to affect vested rights adversely, particularly when they are being litigated. When a statute deprives a person of his right to sue or affects the power or jurisdiction of a Court in enforcing the law as it stands, its retrospective character must be clearly expressed. Ambiguities in it should not be removed by Courts, nor gaps filled up in order to widen its applicability. Such statutes must be construed strictly and not given a liberal interpretation.

English and Indian cases referred to.

The intention of the Legislature has to be gathered from the language actually employed in the Act. For statutes which confer or take away legal rights, whether public or private or alter the jurisdiction of Court of law, express and unambiguous words are necessary.

Per C. J.: The operation of section 176(1) of the Constitution Act is to be confined to cases in which the proprietary rights or interests of the Province are affected.

The consideration of pith and substance of an Act arises where the Court is enquiring whether a particular Act falls within one Legislative List or another.

Federal Court Appeal No. 5 of 1940.

Dr. Narain Prasad Asthana*, (*Advocate-General of the United Provinces*) and *Mr. Sri Narain Sahai, Advocate, Federal Court, instructed by Mr. G. Sahay, Agent for the Appellant.

Mr. Peary Lal Banerji, senior Advocate, Federal Court and ***Mr. Prem Mohanlal Verma, Advocate, Federal Court, instructed by Mr. T. K. Prasad, Agent***, for the Respondents.

The following judgments were delivered :

December, 6.

Gwyer, C. J.—In this case the principal question to be decided is whether the Regularization of Remissions Act, 1938 (XIV of 1938), an Act of the Legislature of the United Provinces, was within the competence of the Legislature which enacted it.

The litigation in which the question has arisen can be briefly

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described. The defendants to the original suit were *thekadars*, a *thekadar* being, by statutory definition, "a farmer or other lessee of proprietary rights in land, and in particular of the right, to receive rents or profits", with the terms of his lease or *theka* embodied in a written instrument executed by the landlord. They were sued by their lessors for arrears of rent for the year ending June, 1931, and the two following years at the rate reserved by the lease, and among other defences pleaded that remissions of rent had been ordered by the Local Government which ought to be taken into account in calculating the amount due. The plaintiffs contended that these remissions were beyond the power of the Government to order and that the defendants were not therefore entitled to rely upon them. On this issue both the trial Judge and the District Judge on appeal decided in the defendants' favour. The plaintiffs then appealed to the High Court, and during the pendency of the appeal a Division Bench of the High Court held in another case, *Muhammad Abdul Quaiyum* v. *Secretary of State for India* (1), that remissions made in pursuance of the Government order above referred to had no legal effect, In order to appreciate the legal questions involved, it is necessary to refer to certain statutory provisions contained in the Agra Tenancy Act, 1926, which at all material times regulated the relations between the parties, though it has since been repealed and only re-enacted with substantial alterations.

The purpose of the Act is indicated by its title, "An Act to consolidate and amend the law relating to agricultural tenancies and certain other matters in Agra," and it may be described as a code of landlord and tenant law for the province of Agra. At the end of that Part of the Act which dealt with the subject of rent and of the machinery whereby in certain circumstances rent might be enhanced or abated, there was a fasciculus of sections entitled "Exceptional Provisions," including three sections which require to be noticed. Section 72 empowered a Court making a decree in a suit for arrears of rent to allow, with the sanction of the Collector, such remissions from the rent payable as might appear to the Court to be just, if the produce of the land had been so diminished by drought, hail, deposit of sand or other like calamity during the period for which the arrears were claimed that the full amount of rent payable by the tenant for that period could not be equitably decreed. The section then provided that where rent was thus remitted, the revenue authorities should on

(1) I. L. R. (1938) All. 114.

the report of the Court grant a remission of land revenue in proportion to the rent remitted for the corresponding area belonging to the same landlord. Section 73 dealt with the converse case, and provided that when for any cause the Local Government, or any authority empowered by it, remitted or suspended for any period the whole or any part of the revenue payable in respect of any land, a Collector might order that the rents of the tenants should be remitted or suspended " to an amount which shall bear the same proportion to the whole of the amount payable in respect of the land as the revenue of which the payment has been so remitted or suspended bears to the whole of the revenue payable in respect of such land." By Section 74, an order passed under Section 73 was not to be questioned in any civil or revenue court, and no suit was to lie for the recovery of any rent of which the payment had been thus remitted or suspended. It will be seen therefore that, in the first case, the remission or suspension of land revenue followed the remission or suspension of rent allowed by the Court and sanctioned by the Collector; and that, in the second, remission of rent might be ordered by the Collector only after the Local Government had remitted or suspended the land revenue. Section 73 was expressly extended to *thekadars* by Section 219 of the Act, but not Section 72. The reason no doubt was that where the parties had embodied their contract in a formal written instrument, they must in agreeing upon the amount of rent be assumed to have had in mind the possibility of such occurrences as were dealt with in Section 72; but a remission or suspension of land revenue under Section 73 would destroy the basis upon which they must necessarily have contracted and it would be inequitable if a consequential adjustment were not permitted.

In 1931, the United Provinces were faced with a catastrophic fall in agricultural prices, followed by threats to withhold rent on a large scale. Faced with what was clearly a most difficult situation, the Government appears to have acted with courage and promptitude. It took the view that the most urgent problem was that of rent, and devised a scheme for the systematic reduction of rents, varying with the circumstances of the different Districts, followed later by consequential adjustments in land revenue. The plans adopted were described in a series of communiques issued from time to time, the first being dated April 29, 1931, and the last October 28, 1932. The Government appears to have been well aware of the legal position, for in its last communique, a statement

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on the Report of the Rent and Revenue Committee of the Legislative Council, it observed that " the Governor in Council . . . recognizes that the action which Government were compelled to take last year was not covered by any provision in the existing law, and he is as anxious as any party that the position should be regularized as soon as possible. But owing to the magnitude of the problem the process will inevitably take time. The law was not framed to meet such a position as has arisen from the recent severe fall in prices." The Government, in other words, were faced with a problem with which executive governments have often to deal; a grave emergency, threatening public order, and inadequate powers for meeting it. In circumstances such as these a government has to do the best it can, relying, if it exceeds the limit of its powers, upon the willingness of the Legislature to indemnify it subsequently; and Legislatures are usually prepared to grant a government absolution, if they are satisfied of the gravity of the emergency, of the *bona fides* of the action taken, and of the reasonableness of the measures adopted. A government however always runs the risk of the measures which it has taken becoming the subject of legal proceedings before it has obtained its indemnity, and this is what happened in the present case. It is clear that Section 73 of the Act only enabled remissions of rent to be ordered, if there had been a prior remission of land revenue; and therefore the orders of the Government on this occasion had no legal force or effect and could not be relied upon by any tenant in a suit by his landlord for the recovery of arrears of rent. The Allahabad High Court so decided, as I have already stated; and it was because of this decision that the Government found themselves compelled to invite the Legislature to pass the Act which is the subject of the present appeal; the question is whether that Act is effective for the purpose for which it was designed. I think it right to observe, in justice to the Government, though the matter does not of course affect the legal position, that while no doubt its action exposed it to much criticism, a substantial number of landlords were willing to co-operate with it in meeting the emergency. This appears from the communique of May 11th, 1931, in which the Government recorded its appreciation of the spirit shown by a deputation of the Taluqdars of Oudh who had waived their legal claims and agreed without condition to remit whatever Government considered fair to their tenants; and also of the generosity with which they agreed without having shown their willingness to grant remission to a large number

of cultivators. It is desirable that this should be said, for courts of justice, while giving no countenance to the theory that governments are at liberty to break the law whenever they find it convenient to do so, ought to abstain from harsh or ungenerous criticism of measures taken in good faith by those who bear the responsibility of government, when suddenly faced with a serious and perhaps dangerous situation.

The Regularization of Remissions Act, 1938, had been passed before the present appeal came before the High Court, and when the appellants sought to take advantage of it, on the ground that the respondents could no longer challenge the validity of the remission orders, the latter replied by challenging the new Act itself. This point was referred to a Full Bench, which held the Act to be beyond the competency of the Legislature to enact. The three learned Judges who composed the Bench (Iqbal Ahmad, Bajpai and Mohammad Ismail, JJ.) all took the view that the Act was contrary to the provisions of section 292 of the Constitution Act, because it attemtped to legislate retrospectively ; but Iqbal Ahmad, J. was also of opinion that none of its provisions were with respect to any of the matters set out in List II of the Seventh Schedule to the Constitution Act, nor indeed with respect to any of the matters in List III, the Concurrent List.

Before the case was heard by the Full Bench, the High Court had caused notice to be given to the Advocate-General of the Province, in order that, if the United Provinces Government so directed, he might appear and support the validity of the Act. The Advocate-General was accordingly heard ; and when, after the Full Bench had given judgment, the case came again before the High Court to be finally dealt with, the Government applied to be made a party to the appeal, in order that (as the application stated) it might have a right of appeal to the Federal Court. The application not being opposed, the Government was duly made a party ; and its name appeared thereafter as respondents on the record, under the style of the United Provinces Government, in addition to those of the plaintiffs-appellants and the defendants. In the final order of the High Court however, admitting the appeal to this Court, the parties on the record are described as "The United Provinces, Applicant *(sic)* to the Federal Court", with all the original plaintiffs and defendants as respondents. It is in that form that the appeal has now come before us. It should be added that the defendants did not enter an appearance in this Court and only the United Provinces and the plaintiffs were represented at the hearing.

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In these circumstances counsel for the lessors took a preliminary objection and contended in a very able argument that the Advocate-General ought not to be heard, because the High Court had no power to make the Province a party to the suit and the Province had therefore no right to appeal. He put it as a matter of jurisdiction and not merely as a wrongful exercise of discretion by the High Court.

The application of the United Provinces was made under order 1, rule 10(2) of the Civil Procedure Code, the material words of which are as follows:—"The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order..................that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, to be added." Counsel for the lessors argued that the desire of the Province to secure the right of appeal did not make order 1, rule 10(2) applicable to the case; but he also based his argument on broader grounds and contended that the mere fact that the validity of provincial legislation was being challenged was no sufficient reason for making the Province a party to a suit between private persons.

I desire to say at the outset that, assuming for the moment that there was jurisdiction to add a party to represent the executive Government of the Province, that party ought not in my opinion to have been the Province itself. It is true that by section 176(1) of the Constitution Act a Provincial Government may sue or be sued by the name of the Province, and may, subject to any provisions which may be made by Act of the Federal or the Provincial Legislature, sue or be sued in relation to its affairs in the like cases as the Secretary of State in Council might have sued or been sued if the Act had not been passed. But it seems to me that where the validity or constitutionality of provincial legislation is in issue, and not any matter relating to the proprietary rights or interests of the Province, it is more convenient and more correct that the Advocate-General should represent the executive Government for the time being of the Province. This is the Dominion practice, and in my opinion it ought to be followed in India. The Secretary of State was first made liable to be sued by section 65 of the Government of India Act, 1858, and the same suits and remedies were made available against him as had been available against the East

India Company. He was no doubt substituted for the East India Company after the transfer of all the rights of the Company to the Crown, because under the constitutional arrangements made by the Act of 1858 he had complete control of all the revenues of India. But the question of the constitutionality of an Indian statute could rarely have arisen before the present Constitution Act, and even more rarely still in the case of a provincial statute; and it seems to me, as I have said, that the more convenient course is to confine the operation of section 176(1) to cases in which the proprietary rights or interests of the Provinces are affected, and, if the Government of a Province desires to uphold the validity of a provincial Act or to challenge that of a Federal Act, it should direct the Advocate-General of the Province to intervene on its behalf.

A number of cases were cited on the true construction of order 1, rule 10. Counsel for the lessors relied principally upon *Sri Mahant Prayaga Doss Jee Varu* v. *Board of Commissioners for Hindu Religious Endowments, Madras* (1), in which Srinivasa Ayyangar, J. refused an application by the Secretary of State to be added as a party in a case said to involve the question whether an Act of the Provincial Legislature was *ultra vires*. The learned Judge, treating the case as one of first impression, held that the words "all the questions involved in the suit" must refer to questions as between the parties to the litigation, that neither on principle or authority could the Secretary of State be regarded as a necessary or a proper party, and that he ought not to be joined as an additional defendant. He concluded his judgment with these words:—"Having regard to the number and variety of legislative bodies and authorities in the country at the present day, paramount, imperial, local, delegated, subordinate, etc., I feel that questions of *ultra vires* are certain to be raised in the Courts in increasingly large numbers of cases and I refuse to contemplate with equanimity the prospect of the Secretary of State for India being required by every defendant to be made a party in every one of them." This judgment was criticised and dissented from in *Secretary of State and others* v. *Murugesa Mudaliar* (2) by Venkata Subbarao, J., a case in which the plaintiff had brought a suit against a District Board for a declaration that he had been duly elected a member of the Board by a resolution passed at the meeting of a certain Taluq Board. The Government applied to be joined as a defendant, but both plaintiff and defendant opposed the application. It was held that since by a local Act Government had the power of control over

(1) (1927) I. L. R. 50 Mad. 34. (2) A. I. R (1929) Mad. 443.

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all local boards in the Province and could suspend the execution of any resolution (as they had apparently done in the case of the Taluq Board), it was a proper party to the suit and ought to be added. The learned Judge was of the opinion (which I cannot myself share) that Srinivasa Ayyangar, J. had in the earlier judgment ignored the distinction made in Order 1, rule 10, between (1) persons who ought to have been joined, and (2) persons whose presence is necessary to enable the Court completely and effectually to adjudicate upon and settle all the questions involved in the suit, *i. e.*, between necessary parties and proper parties. Basing his opinion on earlier English and Indian authorities, he held that the Court was not bound to decide a dispute in the absence of persons whom it most vitally concerned, and that in the case before him it was the Government who had interfered with the alleged right of the plaintiff by suspending the execution of the resolution of the Taluq Board. Hence he concluded that the Government was a proper party to the suit.

It is not clear to me that Srinivasa Ayyangar J. would have come to a conclusion contrary to that of his brother Judge, if the later case had come before him; for different principles appear to be involved in the two cases. The question of the validity of the Act could certainly have been decided in the absence of the Secretary of State in the first case, though it might have been convenient to have him represented before the Court. In the second case it was in effect the action of the Government itself of which the plaintiff complained. But it is obvious that in the later case a wider view was taken of the powers conferred by Order 1, rule 10, and stress was laid rather upon the words "effectually and completely to adjudicate upon and settle all the questions involved in the suit" than upon the words "necessary to enable the Court" which preceded them. The Allahabad High Court appear to have gone further in *Jaimala Kunwar* v. *Collector of Saharanpur* (1) and to have held that the Court has inherent powers of its own in the matter which are not restricted by Order 1, rule 10; but I should always hesitate to rely on unspecified and undefined inherent powers as a justification for any action taken, if it is possible to avoid doing so. In any case, the first of the Madras decisions is directly in point in the present case, though the report does not indicate how the question of *ultra vires* in fact arose in connection with the provincial statute which was under discussion, nor is it easy

(1) (1933) I. L. R. 55 All. 825.

to see how under the Government of India Act, 1919, and the Devolution Rules, questions of *ultra vires* in the case of provincial statutes could have come before the Court. The decision in the later case may have been justified on the facts, but those facts were very different from those which are now under consideration.

Since the new Constitution Act, however, the position with regard to the competence of Indian Legislatures, whether the Central Legislature or the Legislatures of the Provinces, is completely changed ; and the cases which have already come before this Court during its brief history show the difficulty and complexity of the disputes in which questions of legislative competence are involved. I think that it would be a matter of great regret to this Court if in any such case it had not the assistance of the Advocate-General of the Province concerned, and this point was not overlooked when the Rules of the Court were drafted (see Federal Court Rules, Order XXXVI). But in the absence of such an express rule in the Code it is necessary to decide, first, whether the Advocate-General was rightly empowered to intervene as a party on the record, and, secondly, whether in the paiticular circumstances of the present case he has an independent right of appeal.

It can but rarely happen, in cases between private persons involving the constitutional validity of a statute, that an Advocate-General is a "necessary" party ; and I am not prepared to say without further consideration that he is even a "proper" party in each and every case. But in a number of cases, of which the present is an example, the question whether a statute is or is not valid involves the question of the scope of the executive authority of the Province. The executive authority of a Province vests in the Governor on behalf of the Crown, and extends to all matters with respect to which the Legislature of the Province has power to make laws (section 49 of the Constitution Act). If then a provincial Act purporting to confer powers upon the executive is held to be beyond the competence of the Provincial Legislature, the scope of the executive authority of the Province is thereby declared to be more restricted than Legislature and Government had supposed or intended. If the Act impugned in the present case is held to be invalid, orders issued by or under the authority of the Provincial Government in the past can be questioned in a court of law, and the Government would have no power to issue any orders of the kind in the future. It is therefore impossible for a Court so to

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decide in litigation between private parties without imposing a hitherto unsuspected restriction upon the powers of the Government; and it does not seem right that this should be done without the Government being a party to the proceedings before the Court. In my opinion the Advocate-General of the Province is a proper party, in the sense that without him the Court cannot effectually and completely adjudicate upon and settle all the questions involved in the suit. I am not prepared to extend the operation of Order 1, rule 10, beyond what is necessary, but it seems to me that to allow the Advocate-General to intervene as a party in cases of this kind is for the reasons which I have given within the spirit and I think also the letter of the rule.

The Judicial Committee held in ***Esquimalt and Nanaimo Railway Company* v. *Wilson*** (1) that when an action, if successful, will affect the rights claimed by the Crown, but the plaintiff has against the Crown no claim to which the procedure by petition of right is applicable, the Attorney-General is nevertheless a necessary and proper party and may be joined as a defendant by the plaintiff. In that case the validity of a Crown grant, and not of a statute, was challenged but I draw attention to the following observations of Lord Buckmaster, who delivered the judgment of the Committee:— "It is quite true that the title of the Crown to the land in question is not in controversy, nor is the Crown asked to do any act or grant any estate or privilege; but in the event of the plaintiffs' success, the rights existing in the Crown and consequent upon the grant to the respondents will cease. If these interests lay in a third party, he ought certainly to be added as a defendant and that is the best means of testing the necessity of the attendance of the Crown" (at page 363). Adapting these words, I might say that in the event of the lessors succeeding in the present case, certain rights of the Crown, that is, of the executive of the Province, will cease to exist, in the sense that they will no longer have that extended effect which it was believed that the impugned Act had given them. In a recent case in a Canadian Province, ***Beauharnois L. H. & P. Company* v. *Hydro-Electric Power Commission*** (2) a local Judicature Act had provided that no Act of the Provincial Legislature should be adjudged invalid in any proceedings until after notice had been given to the Attorney-General of Canada and to the Attorney-General of the Province and that the two Attorneys-General were entitled as of right to be heard, notwithstanding that the Crown was

(1) [1920] A. C. 358.
(2) (1937) 3 D. L. R. (Ont.) 458.

not a party to the proceedings. This enactment was held not to preclude the making of the Crown, represented by the Attorney-General, a party to an action, and the Court, stating that in cases admitting of doubt it was desirable that the Crown should be made a party, declared the Attorney-General to be a proper, if not a necessary, party to the litigation before it. It is not necessary for me to say whether I agree with this more general proposition; I am content to limit my observations to cases where to challenge the validity of a statute would, if successful, affect the executive authority of the Province. It would no doubt be often, perhaps usually, convenient if the Court had the Advocate-General of the Province before it, when the validity of a provincial statute is in issue; and High Courts may desire to consider whether they should not frame a rule of their own upon the subject, which will set all doubts at rest.

It seems to me however by no means to follow that, because the Advocate-General of the Province has been permitted to be put on the record as an intervener in the suit, he is also entitled to prefer an independent appeal to this Court, in the absence of any appeal by the parties. He has an interest in the litigation, it is true, but the suit is after all between private parties; and if they are content with the decision of the Court, whether it be in favour of the plaintiff or the defendant, it is difficult to see on what principle the Advocate-General can be held to have a *locus standi* sufficient to justify an independent appeal of his own. If one of the parties appeals, then of course the Advocate-General has a right to appear before this Court, since he is an intervener in the suit; but he is a party only in a very special and limited sense. The doubts which I have felt on this point are not diminished by a very recent decision of the Canadian Supreme Court: *Att.-Gen. of Alberta (Intervenant)* v. *Kazakewick* (1). In that case the Supreme Court of Alberta had held that a statute under which a husband had been ordered to pay a certain sum towards the maintenance of his wife was beyond the competence of the Provincial Legislature to enact. The Attorney-General of the Province had intervened to uphold the validity of the Act, and special leave to appeal to the Supreme Court of Canada had been granted both to the Attorney-General and to the wife; but the wife failed to perfect her appeal. The Supreme Court were of opinion that though, on an appeal to the Court by the wife, the Attorney-General would in the ordinary course have the right to appear in order to support the

(1) (1937) Can. S. C. R. 427.

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validity of the Act, he had no status to appeal to the Court, so long as the wife had not perfected her appeal, and that until she had done so the Court had no jurisdiction. This decision seems to me, if I may respectfully say so, to be based upon sound principle, and in my opinion this Court ought to follow it. There is a significant observation by Lord Haldane in *John Deere Plow Co.* v. *Wharton* (1), that Attorneys-General intervening in private litigation were only entitled to present their views to the Judicial Committee and had no right of reply. If an Attorney-General had in such circumstances an independent right of appeal of his own, it is difficult to see why he should not be allowed a right of reply like any other appellant.

I should be disposed to hold therefore in favour of the lessors on the preliminary point; but as both my brethren are of a different opinion, I will not formally dissent from them. I am very conscious of the difficulty which might be caused if the doubts which I have thought it right to express were justified, for private persons could by a private settlement of their dispute, or even by collusion, prevent a Provincial Government from obtaining a decision of the Federal Court on issues of the highest importance. This is a matter which might well engage the attention of the Central Legislature, who have power under Section 215 of the Constitution Act to make provision for conferring on the Federal Court such supplementary powers not inconsistent with any of the provisions of the Act as may appear necessary or desirable to enable the Court more effectively to exercise the jurisdiction conferred upon it by or under the Act.

I now come to the impugned Act itself. The preamble to the Act runs as follows: " Whereas it is necessary to regularize the remissions of rent made before the passing of this Act on account of the fall in prices;" and Section 2 then provides that "notwithstanding anything in the Agra Tenancy Act, 1926, or the Oudh Rent Act, 1886, or in any other law for the time being in force where rent has been remitted on account of any fall in the price of agricultural produce which took place before the commencement of this Act, under the order of the Provincial Government or any authority empowered by it in that behalf, such order, whether passed before or after the commencement of this Act, shall not be called in question in any civil or revenue Court." All three Judges in the High Court have held that these provisions were beyond the competence of the United Provinces Legis-

(2) [1915] A. C. 330 (334).

lature by reason of Section 292 of the Constitution Act. That section provides that "notwithstanding the repeal by this Act of the Government of India Act" (that is to say, the Government of India Act, 1919), "but subject to the other provisions of this Act, all the law in force in British India immediately before the commencement of Part III of this Act shall continue in force in British India until altered or repealed or amended by a competent Legislature or other competent authority." It is said that since these words keep existing British Indian laws in force *until* they are altered or repealed or amended by competent authority, it is beyond the powers of any authority, no matter how competent otherwise, to legislate with retrospective effect; because, if they do so, they are contravening the provisions of the section which make those laws continue in force up to the moment of alteration, repeal or amendment. The purpose of Section 292 was clearly to negative the possibility of any existing Indian law being held to be no longer in force by reason of the repeal of the law which authorized its enactment; and it is a safeguard usually inserted by draftsmen in similar circumstances. An analogous provision was included in Section 130 of the Government of India Act, 1919 though in that case it took the form of a proviso that the repeal of earlier Government of India Acts should not affect the validity of any existing law. The Union of South Africa Act, 1909, Section 135, is almost identical with Section 292, but a slightly different formula was adopted in the British North America Act, 1867, and in the Commonwealth of Australia Constitution Act, 1900. Section 129 of the former is as follows: "Except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia or New Brunswick at the Union . . . . shall continue in Ontario, Quebec, Nova Scotia and New Brunswick respectively as if the Union had not been made; subject nevertheless . . . . . to be repealed, abolished or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the authority of the Parliament or of that Legislature under this Act." Section 108 of the Australian Act is as follows: "Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth shall, subject to this Constitution, continue in force in the State; and until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration or repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State."

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I pause here to inquire what reason there can have been for Parliament to place such a fetter as is suggested upon the powers of the new Indian Legislatures. No such fetter was imposed by Section 130 of the Government of India Act, 1919 for there is nothing in the words of that section which could by any stretch of language be construed as a prohibition of retrospective legislation. But the suggestion now is that the new Legislatures set up by the Act of 1935, which have certainly been given powers no less wide than those of their predecessors, have nevertheless had a restriction imposed upon them which Parliament admittedly saw no reason to impose at an earlier date. I agree that it is not for this Court to speculate upon the reasons which may have induced Parliament to legislate in one way rather than another; but when I am told that these novel and unexpected provisions have been enacted and that no apparent reason can be assigned for them, I am entitled to ask whether it is not possible to place a different and more reasonable construction upon the language which Parliament has used. It then appears that Parliament has used almost identical language when it enacted the constitution of the Union of South Africa; and the industry of counsel was unable to suggest, nor have I myself been able to discover, that the interpretation which commended itself to the High Court of Allahabad has ever been even hinted at in any South African Court. The same may be said of the Canadian and Australian sections; for though it is true that the wording of those sections is a little different, I confess that I can detect no difference in the meaning of the language used.

I find myself unable to agree with the decision of the High Court on this point, and it is only out of respect for the three learned Judges who have taken a contrary view that I have dealt with the question at any length; for, but for their unanimous opinion, I should have thought it scarcely open to argument. It must always be remembered that within their own sphere the powers of the Indian Legislatures are as large and ample as those of Parliament itself; *The Queen* v. *Burah* (1); and the burden of proving that they are subject to a strange and unusual prohibition against retrospective legislation must certainly lie upon those who assert it. I can see nothing in the language of section 292 which suggests any intention on the part of Parliament to make them subject to that prohibition, nor, so far as that may be relevant, any explanation why Parliament should have desired to

(1) (1878) 3 App. Cas. 889; L. R. 5 I. A. 178; I. L. R. 4 Calc. 172.

do so. The sections in the Dominion Acts to which our attention was called do not seem to have been cited to the learned Judges in the High Court; and I cannot but think that their decision might have been different if they had had those sections before them.

Apart however from the above considerations, I doubt whether the Regularization of Remissions Act does in fact alter, repeal or amend any existing Indian law. There is nothing in it inconsistent with, or repugnant to, the Agra Tenancy Act, 1926. No doubt it adds another case in which a tenant may claim the benefit of remissions of rent as against his landlord to those already specified in the latter Act; but it appears to me to have succeeded in doing so without touching any of the provisions of that Act itself.

The view that the Regularization of Remissions Act was invalid because it was not enacted "with respect to" any of the matters enumerated in List II or List III of the Seventh Schedule to the Constitution Act, though it was strenuously argued in this Court, only found favour in the High Court with Iqbal Ahmad J., the two other Judges holding that the Act was within items Nos. 2 or 21 of List II, or partly within one and partly within the other. These two items are as follows :—

"2. Jurisdiction and powers of all Courts except the Federal Court, with respect to any of the matters in this List; procedure in Rent and Revenue Courts."

"21. Land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents; transfer, alienation and devolution of agricultural land; land improvement and agricultural loans; colonization; Courts of Wards; encumbered and attached estates; treasure trove.".

I am of opinion that in enacting the Act the Legislature has legislated with respect to matters covered by item No. 21.

The subjects dealt with in the three Legislative lists are not always set out with scientific definition. It would be practically impossible for example to define each item in the Provincial List in such a way as to make it exclusive of every other item in that List, and Parliament seems to have been content to take a number of comprehensive categories and to describe each of them by a word of broad and general import. In the case of some of these categories, such as "Local Government", "Education" "Water", "Agriculture" and "Land", the general word is amplified and explained by a number of examples or illustrations, some of which

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would probably on any construction have been held to fall under the more general word, while the inclusion of others might not be so obvious. Thus "Courts of Wards" and "treasure trove" might not ordinarily have been regarded as included under "Land", if they had not been specifically mentioned in item No. 21. I think however that none of the items in the Lists is to be read in a narrow or restricted sense, and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it. I deprecate any attempt to enumerate in advance all the matters which are to be included under any of the more general descriptions; it will be sufficient and much wiser to determine each case as and when it comes before this Court. I am moved to make this observation because of a passage in the judgment of Iqbal Ahmad J., in which he says:—"By the authority given to it to make laws about the collection of rents"—the Provincial Legislature is in my judgment authorized to provide about payment of rent in cash or in kind; to fix the instalments in which rent is to be collected, to make provision about abatement or enhancement of rent, to prescribe the conditions under which the rent may be remitted, to regulate the method by which rent is to be collected and to legislate about kindred matters. The impugned Act however is not with respect to any such matter. It is therefore outside the scope of entry 21 of the Provincial List". I do not know why the learned Judge should assume that the list of illustrations which he gives is necessarily exhaustive. I agree that, if it were, his conclusion might follow logically from his premises; but such *a priori* assumptions are a dangerous guide for the construing of a statute.

The general descriptive words in item No. 21 include "the collection of rents"; and if a Provincial Legislature can legislate with respect to the collection of rents, it must also have power to legislate with respect to any limitation on the power of a landlord to collect rents, that is to say, with respect to the remission of rents as well as to their collection. Item No. 22 of the provincial List is "Forests"; could it reasonably be argued that the power to legislate with respect to forests did not include a power to legislate with respect not only to afforestation but also to disafforestation? Item No. 24 is "Fisheries"; could it reasonably be argued that this only included the regulation of fishing itself and did not include the prohibition of fishing altogether in particular places or at particular times? I have no doubt that legislation with

respect to the remission of rents is legislation with respect to a matter included in item No. 21.

It is then necessary to inquire whether the impugned Act is an Act with respect to "remission of rents", for, if it is, it follows from what I have just said that it was within the competence of the Provincial Legislature to enact it. In my opinion it is such an Act, although it may also be an Act with respect to something else, that is to say, the validation of doubtful executive orders. It does not seem to me necessary to consider what the pith and substance of the Act is, to use a now familiar phrase; for that question does not arise, unless the Court is inquiring whether a particular Act falls within one Legislative List or another. In the present case there is no suggestion of any competition between List I and List II, and if the Act does not fall within List II, (since no one has suggested that it falls within List III), it can only be an Act with respect to a subject-matter which has been overlooked or forgotten, and no Legislature in India could deal with it until the Governor-General had exercised his powers under section 104 of the Constitution Act. The validation of doubtful executive acts is not so unusual or extraordinary a thing that little surprise would be felt if Parliament had overlooked it, and it would take a great deal to persuade me that legislative power for the purpose has been denied to every Legislature, including the Central or Federal Legislature, in India. It is true that "Validation of executive orders" or any entry even remotedly analogous to it is not to be found in any of the three Lists; but I am clear that legislation for that purpose must necessarily be regarded as subsidiary or ancillary to the power of legislating on the particular subjects in respect of which the executive orders may have been issued.

I arrive at the conclusion therefore that the remission of rent is a matter covered by item No. 21, that the impugned Act is an Act with respect to the remission of rent, and that it was within the competence of the United Provinces Legislature to enact it. On this view of the matter, it is not necessary to decide whether the Act is also with respect to matters covered by item No. 2, that is to say, "Jurisdiction and powers of the Provincial Courts"; but, if it had been otherwise, I should have been disposed to say that the jurisdiction and powers of the Courts are not affected merely because certain executive orders are not allowed to be questioned in any Court. If the Act had provided, as it well might, either that these particular orders, if produced from the proper custody, should

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prove themselves, or (if the Act is to be given a rather wider interpretation) that they should be conclusively presumed to have been lawfully made, then it does not seem to me that any doubt could have arisen, unless indeed any Act relating to evidence must also be held to relate to the jurisdiction and powers of the Courts; but this can scarcely be so, in view of item No. 5 in the Concurrent List. If on the other hand it were to be contended that the impugned Act was an Evidence Act and therefore in competition with List III, then I should have no hesitation in holding that its pith and substance is rent or remission of rent and not an amendment of the law of evidence, and that therefore it still fell within List II.

Two other points were raised in the course of the argument, but they need only be mentioned to be dismissed. There is nothing in the contention that the Act is void under section 299(3) of the Constitution Act, because the prior sanction of the Governor had not been obtained to the introduction of the Bill, since it is completely disposed of by the provisions of section 109(2). The contention that the Act bars a civil remedy and therefore conflicts with sections 4 and 9 of the Code of Civil Procedure, a matter falling under List III, so that by reason of section 107(2) of the Constitution Act the assent of the Governor-General would be required to make an Act passed by a Provincial Legislature with respect to it valid, is equally barren of substance. Section 4 of the Code only applies "in the absence of any specific provision to the contrary" and section 9 excepts suits which expressly or impliedly are not cognizable by the Courts.

But, if, as I hold, the Regularization of Remissions Act was not beyond the competence of the Legislature to enact, the question still remains what is to be the effect of such a decision. The *thekadars*, the original defendants, entered no appearance in this Court, and the Province was the only appellant. The Province was not interested in any way in the original dispute between the plaintiffs and the defendants, save to uphold the validity of a particular law which had been challenged in the course of the proceedings. It is in my opinion impossible for this Court, at the instance of a third party who had no direct interest in the original suit, to order the High Court to vary the decree which it has given as between plaintiffs and defendants; and the difficulties which would arise if any other view were taken lend additional force to the doubts which I have already expressed on the right of the Province to appeal at all. I think therefore that the appeal should be dismissed,

and my brothers concur, though for different reasons. In these circumstances it is not necessary for me to express an opinion on two other points which were strongly argued before us by counsel for the lessors, that is to say, whether the Act ought to be construed as having no application in the case of suits pending at the time when it is passed, and whether the provision in it which forbids the remissions from being questioned in a court of law has the effect of validating them for all purposes, and of preventing any suit for recovery of the rent alleged to have been remitted. Many interesting questions of law arise in connection with both these points, which might be profitably discussed on a more appropriate occasion, but I express no opinion on them now.

The appeal will be dismissed. There will be no order as to costs.

Sulaiman, J.:—This is an appeal by the United Provinces which intervened and were impleaded in the second appeal before the High Court. The present suit was instituted on the 5th December, 1934, by two landholders for their share of the arrears of rent for the period, 1339-1341 Fasli (1931-1934 A. D.), against the defendants who were *thekadars* (lessees of proprietary rights in agricultural lands) under a registered document, dated the 20th April, 1928, fixing an annual rent of Rs. 948 and entitling the *thekadars* to make collection of rents from tenants. The defendants claimed a deduction on account of remissions of rent which had been ordered. The Assistant Collector rejected the plaintiffs' contention that remissions could not be set off under the terms of the *thekanama*, made a deduction of Rs. 908-8-3 on that account in the rent for the years in suit, and allowing for Rs. 105 as remission in revenue, decreed the suit in part. On appeal, the District Judge rejected the contention that the scale of remission of rent was excessive and upheld the first court's decree.

On the 26th September, 1935, the landholders appealed to the High Court and in their grounds Nos. 2, 3 and 6 urged that it had not been shown that remissions in revenue and rents were made under section 73 of the Agra Tenancy Act (Act III of 1926), and that the decision of the Assistant Collector was not final under section 74 of that Act, which had been misconstrued.

Another suit, which had been filed by Muhammad Abdul Qaiyum, a landholder, in 1935, against the Secretary of State, for a declaration that orders for remission of rents previously made were not legally authorized and for injunction and damages, came up in appeal before the High Court and was disposed of on the 13th

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May, 1937, *Muhammad Abdul Qaiyum* v. *Secretary of State for India* (1). The High Court held that the remissions, not being in accordance with section 73 of the Agra Tenancy Act, were *ultra vires* and illegal, and section 74 of that Act was not a bar to that suit; but the suit was dismissed on the ground that the then plaintiff should have sued his tenants ignoring the remissions.

While the appeal in the present case was pending in the High Court, the impugned Act, *viz.*, The United Provinces Regularization of Remissions Act (Act XIV of 1938) came into force on the 24th September, 1938. The appeal came up before a Bench of two Judges who allowed time to the United Provinces Advocate-General to consult his Government whether they would like to be heard on the question of the *ultra vires* nature of the impugned Act. Later, the question of law whether Act XIV of 1938, was or was not *intra vires* the legislature, was referred to a Full Bench of three Judges for an authoritative pronouncement. Before the Full Bench the Advocate-General was allowed to be heard on behalf of the Government. Although there were differences of opinion on some of the points raised in the case, all the three learned Judges ultimately came to the conclusion that the Act was *ultra vires* the legislature. The case then went back to the Division Bench. On the 8th April, 1940, an application was presented on behalf of the United Provinces Government praying that the Government be formally impleaded as a party to the case. The application came up for disposal on the 9th April, 1940. The Court ordered, " This application is not opposed. Let the United Provinces Government be made a party to the appeal ". On the 12th April, 1940, the Division Bench, accepting the opinion of the Full Eench, allowed the appeal and decreed the claim to the extent of the remissions. On the same date the High Court granted the required certificate under section 205(1) of the Government of India Act. The appeal was finally admitted on the 18th June, 1940.

Preliminary objection.—Mr. Peary Lal Banerji has raised a preliminary objection to the hearing of the appeal filed by the United Provinces. The statement in the order of the High Court that the application was not opposed and the fixing of a date with consent, implied that some Advocate for the plaintiffs-appellants was present and did not think it fit to oppose the application. There is no affidavit before us to show that both of the appellants' Advocates were absent, or to show that the Advocate who was present had no authority to accept notice. They admittedly

(1) I. L. R. [1938] All. 114; (1937) A. L. J. 1396.

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appeared at the next hearing. It is, however, urged that their acquiescence would at best amount to an admission on a point of law that an application for impleading the United Provinces Government was not improper, and so there should be no estoppel against the objection being considered on its merits here.

Section 107 (2), Civil Procedure Code, confers on an appellate court the same power and directs it to perform, as nearly as may be, the same duties as are conferred on courts of original jurisdiction. Courts of original jurisdiction have under Order 1, rule 10 (2), Civil Procedure Code, power to order that the name of any person who ought to have been joined or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved, be added. A person would be a necessary party if he ought to have been joined, that is to say, in whose absence no effective decree can be passed at all. He would be a proper party to be impleaded if his presence is necessary for an effectual or complete adjudication.

In a suit between a landholder and his tenant, the Provincial Government cannot be considered a necessary party at all, as a proper decree can certainly be passed in their absence. But when in such a suit the validity of an Act of the Provincial Legislature is in question, the adjudication would affect a large section of the public, and the Provincial Government would be indirectly interested in such an adjudication. In the present case the Government were interested to this further extent that the effect of the High Court's ruling would be to nullify certain orders, previously issued by the Government, the enforceability of which was indirectly attempted by the impugned Act. Apparently the defendants were too poor to think of preferring an appeal to the Federal Court; and the High Court thought that it would not only be convenient but quite fair to make the United Provinces Government a respondent to enable it to secure a more authoritative pronouncement. As the Act was passed during the pendency of the High Court appeal, there was no earlier occasion on which the Government could have been impleaded.

It is contended before us that the powers of an appellate court are restricted within the limits imposed by Order XLI, rule 20, and that the same restriction is imposed on a court hearing a second appeal under Order XLII, Civil Procedure Code. That rule no doubt permits of making a person respondent, who was a party to the suit in the original court, and who has not been made

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a party to the appeal, but is interested in the result of the appeal. Obviously, this rule would not apply to the present case. But the language of the rule does not show that it is exclusive or exhaustive so as to deprive a court of any inherent power which it may possess and can exercise in special circumstances, and which has been saved by section 151, Civil Procedure Code.

The Allahabad High Court in *Jaimala Kunwar* v. *Collector of Saharanpur* (1), referred to some cases where it had been held that there is also an inherent jurisdiction to add a new party even outside Order XLI, rule 20. There is nothing in the case of *Shiam Lal Joti Prasad* v. *Dhanpat Rai* (2), which in any way conflicts with this. Unfortunately, the headnote of that case is incomplete. It was obviously not intended to lay down that the appellate court has no power to implead a person who was no party to the original suit at all. All that was said was that there was no such power under Order XLI, rule 20, Civil Procedure Code. It was pointed out that section 107, Civil Procedure Code, gives an appellate court powers, generally speaking, of the trial court. In that case the District Judge had impleaded a new person in the appeal and then set aside the decree of the first court and "remanded the case for *retrial*". It was pointed out by the High Court that the proper procedure was to remand the case to the first court with the direction to implead that person and then to proceed to dispose of the case. It would then have been possible for this new party to file his written statement upon which the court would be in a position to consider whether there should be a trial *de novo* on all the issues or whether only some of the issues should be retried. The order of the District Judge for the trial *de novo*, before knowing what pleas the new party would take, was considered wrong. It was therefore suggested that the more appropriate course should be to direct the court below to implead him and give him an opportunity to file a written statement. In the present case the impleading of the United Provinces Government necessitated no retrial. *Pachkauri Raut* v. *Ram Khilawan Chaube* (3), was a peculiar case where a *pro forma* defendant, who had benefited under the first court's decree, was not impleaded in the first appeal by the principal defendants and was sought to be impleaded in the second appeal by the same defendants long after limitation had expired. The High Court

(1) (1933) I. L. R. 55 All. 825 (832).
(2) (1925) I. L. R. 47 All. 853 ; A. I. R. 1925 All. 768.
(3) (1915) I. L. R. 37 All. 57.

naturally declined to implead him. The earlier cases referred to therein were under the previous Code. I, therefore, find it difficult to hold that the High Court had no jurisdiction at all to implead the United Provinces Government as a party to the appeal, particularly when no objection was taken on behalf of the plaintiffs on that occasion. If there were no such jurisdiction at all, then the Provincial Government cannot appeal.

Really, the question before us is not whether the United Provinces Government were rightly impleaded. As regards that point, I myself may prefer a different course. The only question that now remains is whether the appeal itself is incompetent on the ground that the High Court erred (assuming that it did) in impleading the United Provinces Government. If the discretion was wrongly exercised, that would be no ground for holding that the appeal itself does not lie. Section 205(2) of the Government of India Act lays down that where the certificate under sub-section (1) has been given (as it has been done in the present case) "any party in the case" may appeal to the Federal Court, on the ground that any such (constitutional) question, as aforesaid, has been wrongly decided. This was not like a case where an Advocate-General may be allowed to intervene merely to present before the Court the point of view of his Government, if such a duty is assigned to him by the Governor under section 55(2) of the Act. In such a case he would have no independent right of appeal. In India we have a specific provision in section 176(1) under which a Provincial Government can be sued and therefore made a party by the name of the Province. Here the High Court by an express order brought the United Provinces Government on the record, and then made them a party to the appeal, and indeed it did so with the idea that that would give to the United Provinces Government a right to appeal to the Federal Court. It cannot now be said that the United Provinces Government were not "any party" in the appeal. Section 205 does not say any party 'directly aggrieved by the judgment, decree or the final order', much less 'directly aggrieved by the decree actually passed'. In the absence of any such restriction in section 205 and in view of the fact that an appeal lies even on a constitutional question alone without raising any other ground, I am unable to hold that the United Provinces Government who were a party to the appeal in the High Court have no right of appeal at all. Whether, if we allow the appeal, we should direct the High Court to exercise powers similar to that given by Order XLI, Rule 33, Civil Procedure Code, so as to vary the decree, would be another matter,

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Several objections were taken to the validity of the impugned Act, XIV of 1938. These may be classified under three heads:—

I. The objection, which has been accepted by all the three learned Judges, is that the Act is void as it offends against section 292 of the Government of India Act.

II. The objection, which has been accepted by one of the learned Judges and not the other two, is that the Act is invalid because it is not with respect to any of the matters enumerated in List II, entries Nos. 2 and 21, or List III, entry No. 4, relied upon by the United Provinces.

III. The objections, which have been rejected by all the three learned Judges, are that—

(a) the Act is void as it offends against section 299 of the Government of India Act; and

(b) it is void because it is repugnant to the existing section 9 of the Code of Civil Procedure.

The respondents have pressed all these before us.

The last two can be disposed of summarily.

Section 299 of the Act.—The objection taken under section 299(3) of the Act that previous sanction of the Governor had not been obtained is completely met by section 109(2), as assent was later given to it.

Section 9 Civil Procedure Code.—Similarly, the objection that the Act bars a civil remedy and therefore conflicts with section 9, Civil Procedure Code, has no force. In the first place, even if there were repugnancy, the Act would under section 107(1) be void only to the extent of the repugnancy. Section 9, therefore, cannot stand in the way of its applicability to a revenue case. In the second place, section 9 itself contains an exception in favour of suits of which cognizance is either expressly or impliedly barred. Section 4 Civil Procedure Code, also contains a saving clause. Not being repugnant to any of the provisions of the Code, the impugned Act does not fall under entries Nos. 4 and 15 of List III.

Section 292 of the Act.—Section 292 of the Government of India Act contains a saving clause for the continuance of the existing laws.

"Notwithstanding the repeal by this Act of the Government of India Act, but subject to the other provisions of this Act, all the law in force in British India immediately before the commencement of Part III of this Act shall continue in force in British India until altered or repealed or amended by a competent legislature or other competent authority."

The High Court has laid a great emphasis on the use of the expression "..............shall continue in force............until altered or repealed or amended". Iqbal Ahmad, J. has thought that this section is more than a mere saving or preserving section. Its effect is not merely to declare that the repeal will not affect the validity of the existing laws, but it proceeds further and enjoins that all the laws shall continue in force until altered, repealed or amended. This is thought to imply that the alteration, repeal or amendment of any previously existing law cannot be made with a retrospective effect at all. It is suggested that the word "until" puts a time limit on the power of the legislatures. As regards the plea that the provisions of section 2 of the impugned Act should be upheld so far as they relate to the orders passed after the passing of the Act, it has been held that the two portions cannot be separated. Bajpai, J. also concurred in holding that section 292 is mandatory and that the law would continue in force until altered, etc., and that as the impugned Act had attempted to do something indirectly which it could not do directly, this cannot be countenanced. The learned Judge further held that what section 292 says has to be preserved in terms of the section only, and not in the manner adopted by the United Provinces Legislature. Ismail, J. held that as the Agra Tenancy Act, (III of 1926), had been neither repealed nor altered at the time the Act was passed, the legislature was not competent to nullify the provisions of the subsisting Act. The legislature could not take away the rights conferred by the old Act without repealing or altering the Act.

Although there can be no doubt that the main object of enacting section 292 was to preserve the enforceability of the then existing laws, the language of section 292 is certainly more emphatic than would have been ordinarily necessary. Section 130 of the Government of India Act, 1919, was a similar section couched in a simple language: "This repeal shall not affect the validity of any law, etc., etc." There is a saving provision in section 129 of the British North America Act, 1867, but the words there are: "All laws in force in Canada, Nova Scotia or New Brunswick at the Union...... shall continue in Ontario, Quebec, Nova Scotia or New Brunswick, as if the Union had not been made; subject nevertheless to be repealed, abolished or altered..............." Similarly, section 108 of the Commonwealth of Australia Constitution Act, 1900, though embodying a somewhat similar provision, has a different phraseology, "Every law...............shall, subject to this Constitution, continue in the State; and, until provision is made in that behalf by the

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Parliament of the Commonwealth, the Parliament of the State shall have..................powers of alteration and of repeal etc., etc." No doubt in Canada and Australia retrospective legislation has been upheld. But in the constitutions of these Dominions the language, as already quoted, is not identical with that used in section 292 of the Indian Act.

The corresponding section 135 of the Union of South Africa Act, 1909, is, however, similar in phraseology to section 292 of the Government of India Act. It says "Subject to the provisions of this Act, all laws in force .... shall continue in force .... until repealed or amended, etc. etc." In spite of the departure from the phraseology adopted in the constitutions of Canada and Australia, there appear to be no adequate historical grounds for singling out the Union of South Africa for a different treatment.

There have certainly been several Acts passed by the Union Parliament which have a retrospective operation, particularly in the case of Marriage Laws. Act No. 20 of 1913, amending the law in force in the several Provinces relating to marriage by banns, contained section 2 which applied to marriages solemnized "before or after the commencement of this Act." Similarly, section 2 of Act No. 17 of 1921 provided that any marriage contracted before the commencement of that Act, which would have been void or voidable by reason of any law repealed by that Act, shall (subject to two conditions) be deemed to be as valid as if duly solemnized after the commencement of that Act. Again, there have been Acts passed in the Union which came into effect by the assent of the Governor-General later than the date from which their operation began. Act No. 29 of 1922, relating to the payment of duty upon the estates of deceased persons and in respect of successions to inheritances, is an instance in point. Our attention has not been drawn to any case where the validity of any South African Act, with a retrospective effect, has been challenged. The passing of such Acts merely shows the interpretation put on section 129 of the Union Act by the South African Legislature and does not take us very far, so long as there is no judicial pronouncement on their validity.

The difference in the language employed in section 130 of the old Act and section 292 of the new Act is certainly marked. The former is in a negative form: "Provided that this repeal shall not affect the validity of any law etc., etc.". The latter is in a positive form: "Notwithstanding the repeal .... all the laws .... shall continue in force .... until repealed,

altered or amended etc. etc.". The former is a mere saving clause, pure and simple, its effect being to make it clear that the mere repeal of the previous Government of India Act shall not *ipso facto* put an end to the other laws previously in force. The latter is a little more than that, inasmuch as it affirmatively continues the other laws until such laws are hereafter altered, repealed or amended. In the former section, the word "repeal" related to the constitutional Acts specified in the Schedule attached. In the latter section "repealed etc." refer to the other laws which are not repealed etc., by the Government of India Act, 1935, but may thereafter be repealed etc. The effect certainly is that until altered, repealed or amended, such other laws do continue in force. The High Court was apparently impressed by the obvious departure from the phraseology of the old section 130, as such a deliberate change is not ordinarily made without a special significance.

There is no doubt that the word "until" does ordinarily connote a point of time. 'Until altered, repealed or amended' is equivalent to saying 'until the alteration, repealment or amendment'. This can have two possible meanings—first, until the date from which the alteration, repealment or amendment takes place, and second, the date on which the Act altering or repealing or amending the previous law is actually passed, or rather when it comes into force. If the Act is retrospective, it would obviously operate from a date earlier than that on which it comes into force. If the view taken in the High Court were to prevail, then no legislation altering, repealing or amending the law which was in force when the Government of India Act was passed, no matter how long afterwards it comes to be passed, can have any retrospective provision so as to affect any transactions prior in time to the date when such Act is actually passed. It would follow that not only the Provincial Legislature but also the Central Legislature would be debarred from giving any retrospective effect, whatsoever, to any Act by which not only a previous Act but any other law is altered repealed or amended. This is a drastic consequence which, it is difficult to believe, could have been contemplated. As long ago as 1878, their Lordships of the Privy Council in *the Queen v. Burah* (1), when speaking of the powers of the Indian Legislature remarked : "when acting within these limits it is not in any sense an agent or delegate of the Imperial parliament, but has, and was intended to have, plenary powers of legislation as

(1) (1878) 3 App. Cas. 889 ; L. R. 5 I. A. 178 ; I. L. R. 4 Calc. 172.

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large and of the same nature as those of Parliament itself." Even though we are not concerned with the wisdom of the legislature, one cannot help saying that there appears to be no adequate reason why the power to give retrospective effect to a new legislation should be curtailed, limited or minimized, particularly when section 292 applies not only to statutory enactments then in force but to all laws, including even personal laws, customary laws and common laws. The suggestion made on behalf of the respondents that the idea was not to permit retrospective legislation having effect from a date earlier than the coming into force of the Government of India Act when legislative powers of the Centre and the Provinces were separately allocated cannot be accepted, because the effect would be not only to stop at the year 1937, but to prohibit retrospective legislation right up to the date of the passing of any new Act, no matter how long after 1937 that may happen. It there are two possible interpretations, it is the duty of a court to accept that one which is more reasonable, more consistent with ordinary practice and less likely to produce impracticable results. It must, therefore, be held that there is nothing in section 292 of the Government of India Act which debars the Central or a Provincial Legislature, which has altered, repealed or amended a previously existing law, from giving the new provision a retrospective effect from dates earlier than when the Act is passed.

One must not, however, overlook the important provision that the previously existing law must in any case continue in force, until altered, repealed or amended. Unless, therefore, there is an Act which actually alters, repeals, or amends it, that law must, in view of the provisions of section 292, continue in force and cannot be considered as non-existent. Those provisions not merely preserve such laws but keep them in force until actually altered, repealed or amended.

But it is not absolutely necessary that a statute must be repealed by express language, *e. g.*, shown as repealed in an attached Schedule. Repeal, and certainly alteration or amendment, can be effected by necessary implication also. When two Acts are clearly inconsistent with or repugnant to each other, the former will be deemed to have been impliedly repealed or amended, as the last expression of the will of the legislature must always prevail. But they must really be irreconcilable with each other. Two negative enactments need not, however, be contradictory. An earlier statute expressed in negative language may

be included in or absorbed by a later statute expressed in a similar negative language, but with a wider scope. The former in such a case would not be repealed, nor even necessarily altered by the latter, as they both can stand together, but it can be said to have been amended.

The impugned Act did not in reality repeal, alter or amend the provisions of the law contained in section 73 of the Agra Tenancy Act. Indeed that was repealed subsequently by Act XVII of 1939. It therefore stood intact in December 1939, by virtue of the provisions of section 292 of the Government of India Act. What the impugned Act attempted to do was to widen the scope of section 74 (1) without embodying anything like the provisions of section 74 (2), which would have destroyed the right to sue. Section 74 (1) of the old United Provinces Act prevented any order, passed under section 73, from being questioned. The impugned Act attempts to prohibit any order for remission from being questioned, without saying any order "under" or "in accordance with" section 73. It follows that without altering the substantive law so as to give a Collector power to order remission of rent exceeding the remission of revenue in proportion, it has merely created a further bar which completely restricts a civil right to challenge it under section 9, Civil Procedure Code. Whether valid or invalid on any other ground, it cannot be said to offend against the provisions of section 292 of the Government of India Act.

List II, Nos. 2 and 21.—While Iqbal Ahmad J. has held that the subject-matter of the impugned Act does not fall within any of the entries in List II or List III of the Seventh Schedule of the Act, both Bajpai and Ismail, JJ. have held that it falls under these two entries.

It is true that the three Lists even if taken together may not prove to be absolutely exhaustive. As legislation can cover a very wide range, it is quite possible to conceive of cases which are not comprised in any of the Lists. It was with the consciousness of this possibility that provision as to residual power of legislation was made in section 104 which assumes that there may be a matter with respect to which a law may be enacted, which is not enumerated in the Lists of the Seventh Schedule. But the Lists are so comprehensive that apart from Personal Laws it would be only extremely rare cases which would not be covered by them at all.

Entry No. 21 of List II includes 'land, with rights therein,

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land tenures, including the relation of landlord and tenant, and the collection of rents', besides other categories. This itself has a wide scope. If the impugned Act were in pith and substance one for remission of rent, it would be impossible to exclude it from this entry. Entry No. 2 of List II includes jurisdiction and powers of all courts, with respect to any of the matters in that List. Accordingly, entries Nos. 2 and 21 read together would cover any restriction that may be imposed on the jurisdiction and powers of courts, with respect to land, land tenures, relation of landlord and tenant, and collection of rents. As there is no category in List I or List III which is similar to entry No. 21 of List II, the latter must be given a liberal interpretation so as to invest Provincial Legislature with full power to legislate with respect to them, so long as such legislation does not conflict with any other provision. I am not prepared to hold that entry No. 21 must necessarily be confined to substantive provisions and not to procedural law. Methods of collection of rent may be a matter of procedure and yet fall under this head. Provisions as to registration of leases, functions of special officers in fixing rents and giving of certain notices, may well be procedural and yet fall within this entry. These are but a few instances. On the other hand, legislation, which affects the jurisdiction and powers of civil or revenue courts, would come under entry No. 2. Legislation affecting procedure in rent and revenue courts would also fall under the same entry. But mere procedure in civil courts will be outside those entries, and can only come under entry No. 4 of List III. The result is that if the subject-matter is within entry No. 21, then restriction on jurisdiction and powers of civil and revenue Courts with respect to it would also be within the authority of Provincial Legislatures. If, however, the matter itself is not within List II, then it cannot be brought under entry No. 2 of that List, which in express terms refers only to matters in that List.

Tenancy Law.—The defendants were *thekadars*, holding under a registered lease of proprietary rights, (including a right to receive rents and profits), from the landholders for a term of years on a fixed annual rent. The word tenant in the Agra Tenancy Act excludes a *thekadar*, though certain specified provisions relating to tenants, including Sections 73 and 74, also apply to them. (See Chapter XIII of the Agra Tenancy Act, 1926). Outside that Act the United Provinces Government had no special power to interfere with the agreement between a landholder and his *thekadar*.

The landholder would be entitled to enforce the liability of the *thekadar* to pay the rent. There are provisions for enhancement and abatement of rent, subject to certain limitations, but with them the Government were not concerned. There was no power given to the Government themselves to order remission of rent in individual cases. Under Section 72, if remission of rent were granted by a Court on account of drought, hail, deposit of sand or other like calamity, then proportionate remission of revenue was to be ordered by the revenue authorities subsequently. Section 73(1) was intended to cover the converse case. When for any cause the local Government, or any authority empowered by it, had in the first instance "remitted or suspended" whole or part of revenue, a collector, or if so empowered by Government, a first class assistant collector, might order the remission or suspension of rents to an amount "which shall bear the same proportion to the whole of the rent payable in respect of the land as the revenue of which the payment has been so remitted or suspended." Under Sub-Section (2), where revenue has been wholly or partly "released, compounded for or redeemed," remission or suspension of rent could be ordered by such authority and in accordance with such scale as the local Government may by rule direct. This sub-section did not apply to the case where revenue had been "remitted or suspended." Sub-section (3) made this provision applicable to a *thekadar*. Section 74(1) provided that an order "under Sub-Section (1) or Sub-Section (2) of Section 73" shall not be questioned in any civil or revenue court. Sub-Section (2) provided that a suit shall not lie for the recovery of any rent of which the payment has been remitted or suspended "in accordance with the provisions of Section 73." As already mentioned, the High Court in *Muhammad Abdul Qaiyum's* case (1) interpreted these two sections as meaning that a civil suit would be barred only if the order were in accordance with Section 73, that is to say, if the remission ordered by the Collector were in proportion to the remission of the revenue. It further held that the aggrieved landholder could sue for arrears of rent ignoring the order of remission, or pay revenue under protest and sue the Government for refund under Section 183 of the United Provinces Land Revenue Act (III of 1901).

The Impugned Act.—If the Provincial Legislature felt that the sections had been wrongly interpreted by the High Court, it was open to it to pass a declaratory or explanatory Act, to make its intention clear. Such a legislation would, of course, have been

(1) I. L. R. [1938] All. 114.

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retrospective in nature, and would have nullified the effect of the High Court's ruling. No such course was followed and instead the impugned Act (United Provinces Act XIV of 1938) was passed. The preamble stated its object to be to "regularize" the remissions of rent made "before" the passing of that Act, which meant that certain orders already passed, which might have been irregular, were to be made regular by this Act. But in fact the provisions of section 2 on the one hand fall short of the object by not attempting to validate any invalid orders that might have been passed before, and on the other hand they go beyond the Preamble by making orders passed even *after* the Act equally unquestionable. They are in the following terms: "Notwithstanding anything in the Agra Tenancy Act, 1926,.....................where rent has been remitted on account of any fall in the price of agricultural produce which took place before the commencement of this Act, under the *order* of the Provincial Government or any authority empowered by it in that behalf, *such order*, whether passed *before or after* the commencement of this Act, *shall not be called in question* in any civil or revenue court". There are two Provisoes, the first limiting the amount to what may be ordered in the agricultural year in which the Act comes into force, and the other to the period of the settlement. The Act was to come into force when notified.

Interpretation.—The intention of the legislature has to be gathered from the language actually employed in the Act. For statutes which confer or take away legal rights, whether public or private, or alter the jurisdiction of courts of law, express and unambiguous words are necessary. No loopholes should be left for escape. The order of remission dealt with by the United Provinces Act is not one necessarily within the four corners of section 73, nor is there any specific reference to that section. The language actually used can suggest that the section was intended to prevent the order of the Provincial Government, or any authority empowered by it in that behalf, from being questioned. In the main section, the word order is used only when referring to "the order of the Provincial Government or any authority empowered by it in that behalf". This is followed immediately by the words "such order etc.". The word "such" ordinarily means 'aforementioned'. The normal construction of the section would then imply that such order of the Provincial Government, or any authority empowered by it in that behalf, shall not be called in question. A reference to section 73, sub-section (2) shows that

where revenue has been "released, compounded for or redeemed" [and not 'remitted' or 'suspended' as under sub-section (1)] the local Government can nominate an authority and make a rule fixing a scale according to which remission or suspension of rent may be ordered. The Government had no power whatsoever to fix any scale for remission or suspension of rent where revenue had been "remitted or suspended" under sub-section (1). Nor can it itself make any order of remissions; it is the Collector who does so in each case under the statutory authority conferred on him by sub-section (1). The Government can empower an Assistant Collector of the first-class to act instead of the Collector, but the order of remission made by him also will not be "under the order of the Provincial Government" but under section 73 (1). It is probable that in issuing the notification containing a scale of remissions the distinction between the two sub-sections was overlooked. At any rate for over seven years no attempt was made to approach the Legislature to validate such action. Similarly when the bill was introduced it was assumed that the Provincial Government itself could order remissions, and it was on that assumption that the Legislature proceeded to enact that such an order should not be questioned. The words "under the order of the Provincial Government" have no meaning so far as section 73 (1) is concerned. On this interpretation, the section would be wholly ineffectual, because in a suit for arrears of rent the landholder is not challenging the scale which the local Government was pleased to lay down, amounting at best to instructions to Collectors, but is challenging the order of the Collector or the Assistant Collector, passed under statutory authority, on the ground that it was not in accordance with section 73, his suit not being barred under section 74.

A majority of the learned Judges of the High Court have expressed the opinion that the real object of the United Provinces Act was not what it purports to suggest. Iqbal Ahmad J. has remarked: "Here again the substance of the section, apart from its form, is to regularize and validate irregular and invalid orders as to remissions of rent passed by the Provincial Executive. There is, therefore, no escape from the conclusion that by the impugned Act validity is given to wholly arbitrary and invalid orders already passed or to be passed in future by the executive authorities". He has again remarked: "Now a scrutiny of the impugned Act as a whole leads to the irresistible conclusion that it was designed to, and does in substance, though not in form,

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validate the invalid orders as to remissions passed by the Provincial Executive......................In short the impugned Act, though disguised as an enactment regulating procedure, is, in fact and substance, an enactment regularizing illegal executive orders. It is a disguised and colourable legislation intended to serve the purpose indicated above, and this is not permissible." Bajpai J. has said: "The Act pretends to deal with procedure only for it attempts to regularize the remissions of rent and says that certain orders of the Provincial Government shall not be called in question in any civil or revenue court, but this is only a masquerade and the real purport of the Act is to take away the rights of the landlords which were contained in sections 73 and 74 of the Agra Tenancy Act, as interpreted by this Court in *Abdul Qaiyum's* case (1). I, therefore, feel inclined to hold that the Act does not deal merely with matters of procedure but deals with substantive rights as well". Ismail J. has not expressed any such opinion.

Past Orders.—As regards past orders, section 2 does not contain any substantive provision which would even imply that the orders were in fact valid or were being made valid. Nor is there any mention that the liability of the tenant to pay the rent remitted has ceased, and the right of the landholder to realize it has been extinguished. It merely attempts to create a bar against the question being agitated in a civil or revenue court. This is quite a different thing from a substantive provision validating any order that might have been passed in contravention of the provisions of section 73 of the Agra Tenancy Act. The opening words "Notwithstanding anything in the Agra Tenancy Act, 1926" do not amount to an alteration, repeal or modification of section 73 of that Act. Indeed, not only was section 73 not mentioned in this Act as having been repealed by it, but was actually repealed later by Act XVII of 1938, which came into force in December of that year. It is possible to conceive of cases, for example where the whole rent has been paid with mutual consent, where the landholder would not stand in need of suing for it, so as to be compelled to call in question the order of remission. His right has not been extinguished, only his remedy in a court of law is barred. The essence of the landholders' grievance is that the Government made them give up their rents in part without in their own turn making compensation to them by giving up a proportionate amount of the revenue. The alleged illegality of the order of remission arises from the circumstance that the Provincial Legislature prevents them from challenging the illegal action of the Government.

(1) I. L. R. [1938] All. 114.

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Future Orders.—The limit to which the past orders of remission had gone was perfectly known. But as regards future orders, the scope of section 2 is very wide. The Government could up to June 1939 (and later if the notification were delayed) issue any order of remissions that it chose. Such an order would be operative irrespective of the extent of the remission, even up to the remission of the entire rent, irrespective of the period of remission, as it can be continued even up to the expiry of the settlement, and also irrespective of the amount of remission of revenue, even to the extent of there being no remission of revenue at all. If it is a valid Act, it enabled the Provincial Government to issue an order directing collectors to remit to all the tenants the whole of the rents for the entire Province for the remainder of the period of the settlement, while not remitting any revenue at all. This would mean that landholders would be compelled to pay revenues to Government, although they would be prevented from realizing any rents at all from their tenants. For all practical purposes, this would amount to an extinction of the relation of landlord and tenant for the time being. Such a measure is highly inconceivable, and yet it is not beyond all possibility that a Government, bent on abolishing zamindari rights, may resort to it under the authority of this section. In spite of the confiscatory powers exercised by the Government, no remedy, whatsoever, would be open to the aggrieved landholders in any civil or revenue court to which alone they can have recourse. This section would therefore invest the Provincial Government with full powers to do what they like, no matter to what extent the contracts between a landholder and his lessee is disturbed. Such a drastic interference may well infringe the proprietary rights possessed by landholders, and may also in an extreme case amount to a flagrant breach of the agreement entered into by the Government at the time of the settlement for its duration. Of course, no Act can be invalidated on the mere ground that it may possibly be abused ; but in order to see in which List it falls, its provisions have to be examined in their full scope.

" *With respect to*".—The crucial point in this appeal is whether this section can be held to be " with respect to " any of the matters mentioned in entry No. 21 of List II, in particular, land, relation of landlord and tenant, and collection of rents. The words " with respect to" are not necessarily the exact equivalent of 'relating to' or 'connected with'. These words may not include a case where the subject of legislation is only remotely related or very indirectly connected with the matters mentioned in the categories. An Act

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may principally be with respect to some other subject and yet it may incidently relate to one under consideration. The mere fact that there is a slight, remote or indirect relation or connexion, would not be sufficient to answer in the affirmative the question whether it is with respect to such subject. It is not enough that it should in its working somehow overreach that subject. It has to be seen whether it appertains to such matters substantially and directly, and not only whether it would in actual operation affect any such matters in an indirect way. Again, a provision of law may be partly in one category and partly outside it. The mere fact that it is partly in that category would not suffice for making it valid if it is *ultra vires* with regard to the other portion. When the question is whether any impugned Act is within any of the three Lists, or in none at all, it is the duty of courts to consider the Act as a whole, and decide whether in pith and substance the Act is with respect to particular categories or not. This can be inferred only from the design and purport of the Act as disclosed by its language and the effect which it would have in its actual operation.

Their Lordships of the Privy Council have repeatedly stressed the fact that we must look to the pith and substance of the Act in order to ascertain its true nature and character. As laid down in *Russel* v. *The Queen* (1), "The true nature and character of the legislation in the particular instance under discussion must always be determined, in order to ascertain the class of subject to which it really belongs."

In *Attorney-General for Canada* v. *Attorney-General for Ontario* (2), Lord Atkin laid down: "In other words, Dominion legislation, even though it deals with Dominion property, may yet be so framed as to invade rights within the Province, or encroach upon the classes of subjects which are reserved to Provincial competence. It is not necessary that it should be a colourable device, or a pretence. If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the Province, or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid." As it was found that the impugned Act was in pith and substance an Insurance Act, affecting the civil rights of employers and employed, it was held to be *ultra vires*. In *Attorney-General for British Columbia* v. *Attorney-General for Canada* (3), Lord Atkin, after pointing out

(1) [1882] 7 App. Cas. 829 (839-40).
(2) [1937] A.C. 355 (367).
(3) [1937] A. C. 368.

the limitation on the plenary power of the Dominion that Parliament "shall not in the guise of enacting criminal legislation in truth and in substance encroach on any of the classes of subjects enumerated in section 92", though there would be no objection if there were a genuine attempt to amend the criminal law, remarked: "In the present case there seems to be no reason for supposing that the Dominion are using the criminal law as a pretence or pretext, or that the legislature is in pith and substance only interfering with civil rights in the Province." In *Att.-Gen. for British Columbia* v. *Att.-Gen. for Canada* (1), Lord Atkin after agreeing with the view that the sections said to be severable were in fact incidental and ancillary to the main legislation, remarked: "as the main legislation is invalid as being in pith and substance an encroachment upon the Provincial rights the sections referred to must fall with it as being in part merely ancillary to it."

In *Shamon* v. *Lower Mainland Dairy Products Board* (2), Lord Atkin's remark was quoted: "It is well established that you are to look at the true nature and character of the legislation', *Russell* v. *The Queen* (3) 'the pith and substance of the legislation'." See also the *Central Provinces Petrol Tax* Case (4).

Section 2.—The question raised in *Muhammad Abdul Qaiyum's* case (5) was not a constitutional one, but merely turned on an interpretation of Sections 73 and 74 of the old Agra Tenancy Act. Its soundness has not been questioned before us, and I can only assume that the previous order of remission of rent as held therein was *ultra vires* and illegal. Had the previous order of remission of rent been merely irregular, as not being in strict conformity with the existing law, but without any absence of jurisdiction in the authority issuing it, for instance when some mistake in the calculation of the ratio is made or there has been any other defect of procedure, then Section 2 of the impugned Act would certainly be with respect to "the collection of rents", so far as such orders are concerned, and it would be *intra vires.*

If the order of remission, which the impugned Act attempts to make unquestionable, was in fact wholly *ultra vires* and totally void, issued by an authority not at all competent to do so, with a view not only to benefit the tenants but also to protect Government officers against any suit for damages that may be brought

(1) [1937] A. C. 377 (389). (2) [1938] A. C. 708.
(3) (1882) 7 App. Cas. 829.
(4) [1939] F. C. R. 18 (95); (1938) 2 F. L. J. 6. (65).
(5) I. L. R, [1938] All. 114.

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on account of their illegal orders, or protect the Government in a suit brought against it under Section 183 of the United Provinces Land Revenue Act (III of 1926), (assuming that the suggestion made in *Muhammad Abdul Qaiyum's* case (1) was correct), then the United Provinces Act which merely prevents such an order from being questioned in a civil or revenue Court, would not be so much with respect to "collecion of rents," as with respect to "validating void orders." There is a clear distinction between challenging the legality of an order in the sense that for non-compliance with certain provisions of law it is invalid or ineffective, and challenging the authority, power or jurisdiction of the person or body, who issued that order. In the latter case the challenge is much more than merely calling in question the order itself. It is an assertion that the act of that authority or body was itself a nullity and no more binding than the act of a man in the street. If the United Provinces Act, which obviously falls short of validating previous illegal and void orders, is principally for preventing illegal orders from being called in question, then it is more substantially with respect to validating such illegal orders than with respect to the matter to which those orders had originally related. In such a case it would not fall solely within the categories "relation of landlord and tenant" or "collection of rent."

Furthermore, the impugned Act is not confined to the orders of remission previously passed, but goes further and provides that even all future orders of remission, regardless of the fact whether they are or not authorised by any law or are contrary to any existing laws, shall be unquestionable. This is inextricably interwoven into the whole scheme so as not to be separable. The whole purport of the Act is indirectly to invest the Provincial Government with very extensive powers to pass any order of remission which it chooses to do even to the extent of stopping all payments of rents. It thus confers in an indirect way a wide power on the Government or authority empowered by it to pass in the future even arbitrary orders for remission, with or without authority, in utter disregard of the existing legislation. If a legislature cannot itself enact a wholesale deprivation of legal rights, then it cannot by enactment adopt the device of appointing an authority invested with such powers. What the legislature cannot do directly, it cannot do indirectly. *Great Western Saddlery Company* v. *The King* (2). But if it can so enact then the possibility of the power being abused in future cannot invalidate the Act. See *C. P. and Berar Petrol Tax* Case (3).

(1) I. L. R. [1938] All. 114.
(2) [1921] 2 A. C. 91.
(3) [1939] F. C. R. 18.

It seems to me that section 2 goes beyond the subject of remission of rents. In pith and substance, it is an Act not only with respect to "the relation of landlord and tenant" or the "collection of rents", but is also with respect to conferring on the Provincial Government very extensive powers of interference with the legal rights of landholders in their lands. But the category of "land" in entry No. 21 of List II includes 'rights in and over land', and is also within the exclusive authority of the Provincial Legislature. Even if by any chance the impugned Act were indirectly with respect to assessment of revenue, it will fall within entry No. 39, and be still in List II. We are not concerned with any unfairness or injustice of the legislation, nor with any injury that may be caused to private rights so long as there is authority to pass it. The only protection available, even though of a limited character, is that contained in section 299 (3) of the Government of India Act, requiring a previous sanction of the Governor, and if that is gone then a representation that assent should be withheld. It would be too late to object afterwards. The want of a previous sanction of the Governor in the present case is cured by the assent given to the Act subsequently. In view of the fresh Tenancy legislation that came into effect in the United Provinces later, the present case is probably the last pending case in which this difficult point has to be decided.

Pending Action.—The learned Advocate for the plaintiffs has in the last resort sought to support the decree of the High Court on the ground that the impugned Act did not apply to the pending action at all. Unfortunately, this point was not raised or argued before the High Court, nor is this a constitutional question. But if we overrule the High Court, we cannot direct it to modify its decree in the light of that Act without disposing of this plea. In that case we must either ask the High Court to do so, or decide the point ourselves.

Undoubtedly, an Act may in its operation be retrospective, and yet the extent of its retrospective character need not extend so far as to affect pending suits. Courts have undoubtedly leaned very strongly against applying a new Act to a pending action, when the language of the statute does not compel them to do so. It is a well recognised rule that statutes should, as far as possible be so interpreted, as not to affect vested rights adversely, particularly when they are being litigated. When a statute deprives a person of his right to sue or affects the power or jurisdiction of a court in enforcing the law as it stands, its retrospective character

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must be clearly expressed. Ambiguities in it should not be removed by courts, nor gaps filled up in order to widen its applicability. It is a well established principle that such statutes must be construed strictly, and not given a liberal interpretation.

In *Moon* v. *Durden* (1), a new Act (Gaming Act, 1845), which was passed while an action was pending, was held not to be retrospective in its effect so as to defeat that action, even though section 18 had said, "*no suit shall be brought* or *maintained* for recovering money etc." The alternative "or maintained" would ordinarily have been held to be applicable to a pending suit. Nevertheless, Parke, B. remarked "It seems a strong thing to hold that the Legislature could have meant that a party who under a contract made prior to the Act had as perfect a title to recover a sum of money as he had to any of his personal property, should be totally deprived of it without compensation".

Similarly, in *Smithies* v. *National Union of Operative Plasterers* (2), Section 4 of the Trade Disputes Act, 1906. was interpreted as not preventing a Court from disposing of an action begun before the passing of that Act, although Section 4 had enacted: "*an action* for tort against a trade union *shall not be entertained* by any Court." Again in *Beadling* v. *Goll* (3), the Gaming Act 1922, which had repealed a section of an earlier Gaming Act, was held by the Court of Appeal not to operate to put an end to the pending action, even though it had enacted that "*no action* for the recovery of money under the said section *shall be entertained* by any Court." In *Henshall* v. *Porter* (4), the Court went further and held that the Gaming Act of 1922 did not prevent the bringing of an action under the repealed section of the older Act, even after the date when the repealing Act came into force in respect of a cause of action which had arisen before that date. In *Thisleton* v. *Frewer* (5) followed in subsequent cases, it was held that Section 32 of the Medical Act, 1858, (c. 90) did not apply to an action for medical services begun before that date, but tried after it, although the section had enacted that *no person should* after the 1st January, 1859, recover any charge for medical treatment *unless he shall prove at the trial* that he was on the Medical Register.

(1) [1848] 2 Ex. 22.
(2) [1909] 1 K. B. 310.
(3) [1922] 39 T. L. R. 128.
(4) [923] 12 K. B. 193.
(5) 31. L. J. Ex. 230.

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The case of the *Colonial Sugar Refining Company* v. *Irving* (1), was pending when the Commonwealth of Australia Constitution Act, 1900, came into force, under Section 73 of which a decision of a Court of any State, from which an appeal would have previously lain to the Queen in Council, became appealable only to the High Court. At page 372, Lord Macnaghten, while considering whether an appeal lay to the Privy Council, laid down the general principles applicable to the retrospective character of a legislation and remarked "On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment." It was further remarked "In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested". This view was of course followed by a Full Bench of the Allahabad High Court in *Ram Singha* v. *Shankar Dayal* (2)

In *Khajeh Solehman Quadir* v. *Salimullah Bahadur* (3), their Lordships had to consider the effect of The Mussalman Wakf Validating Act, (VI of 1913) of which the preamble had expressly stated: "Whereas doubts have arisen regarding the validity of wakfs created by persons professing the Mussalman faith............; and whereas it is expedient to remove such doubts." Section 3 said "It shall be lawful............to create a wakf etc." and Section 4 said "No such wakf shall be deemed to be invalid etc." Their Lordships held that the Act could not be construed as validating deeds executed before its date. In this case the Act had been passed even before the suit had commenced.

No doubt in *Shyamkant Lal* v. *Rambhajan Singh* (4), this Court applied a new Bihar Moneylenders Act (VII of 1939) which came into force after the filing of the appeal. But Section 13 expressly said "When an application is made *before or after* the commencement of this Act etc.". Since then Section 7 of

(1) [1905] A. C. 367.
(2) [1928] I. L. R. 50 All. 965.
(3) [1922] I. L. R. 09 Calc. 820; L. R. 49 I. A. 153; 37 C. L. J. 56.
(4) [1939] F. C. R. 193; [1939] 2 F. L. J. 5; (1939) 71 C. L. J. 369.

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the new Act has been consistently applied in all the Bihar cases, even in suits pending in appeal. But here again Section 7 contains the words "in any *suit brought by a money-lender ... ... before or after* the commencement of this Act in respect of a loan advanced before or after the commencement of this Act or *in any appeal or proceedings in revision arising out of such suit*," which in express terms refer to a pending suit.

In *Mukherjee* v. *Mst. Ram Ratan Kuer* (1) the new Bihar Act had express words to the effect that *all transactons from 1910 shall be deemed to be valid*, which if applicable to the appeal would take away the appellant's right altogether. Their Lordships held that in view of that enactment the appeal should not be allowed.

In *Quilter* v. *Mapleson* (2), a new Act had come into force, Section 14 of which made the section *applicable to old leases* as well, and which clearly deprived the landlord of a right to claim forfeiture. In that case the landlord had not till then re-entered. The Court of Appeal applied the new Act on the ground that appeals had the character of re-hearing and the appellate Court could make such order as ought to be made according to the state of things at that time.

As already mentioned, the landholders in the present case ignoring the order of remission had claimed the full amount of the arrears of rent from the very beginning. Even in the second appeal before the High Court, they had challenged the order of remissions of rent in grounds Nos. 2, 3 and 6 of their Memorandum of Appeal, several years before the impugned Act came into force. They had already called the previous order in question, and that plea was already before the High Court for consideration. The legislature was presumably aware of the previous decision in *Muhammad Abdul Qaiyum's* case (3) and must also have been aware that numerous other suits for arrears of rent must be pending. And yet no express words were put in the impunged Act to show that it should apply to all actions pending in appeal. Further, the provision that no such order shall be called in question has a certain amount of ambiguity in it and leaves it doubtful whether only the parties are prevented from questioning the order or even the Court is debarred from ignoring it as having been issued by an unauthorised body, and enforcing the law that has not been repealed or amended by the United Provinces Act. Of course, no such bar would exist against the

(1) (1935) I. L. R. 15 Pat. 268; L. R. 63 I. A. 47; 62 C. L. J. 419.
(2) (1882) 9 Q. B. D. 672. (3) I. L. R. [1938] All. 114.

Federal Court; but in declaring what decree should be passed by the High Court it cannot ignore such a bar if it exists. In view of the trend of judicial decisions already referred to, I am of the opinion that the impugned Act was not applicable to the appeal pending before the High Court. The decree of the High Court must, therefore, stand and this appeal should be dismissed.

Varadachariar, J.:—The constitutional question arising for decision in this appeal relates to the validity of the Regularisation of Remissions Act (XIV of 1938) passed by the Legislature of the United Provinces. A Full Bench of the Allahabad High Court held the Act to be *ultra vires* that Legislature. All the three learned Judges who constituted the Full Bench were of the opinion that as the Act attempted to legislate with respect to a period anterior to the date of its enactment, a period during which another valid Act was in force, it contravened the provisions of section 292 of the Constitution Act. One of the learned Judges (Iqbal Ahmad J.) based his conclusion on an additional ground, *viz.*, that the impugned legislation was not one made "with respect to any of the matters enumerated in List II" of the Seventh Schedule to the Constitution Act nor even one with respect to one of those enumerated in the third List. The circumstances that led up to the impugned legislation and to the attack on its legality have been stated in the judgments just delivered. Reference has also there been made to the stage at which the Government of the United Provinces came to be impleaded as a party to this litigation and to the fact that this appeal has been preferred not by the original defendant but by the Government of the United Provinces.

At the hearing of this appeal, the learned counsel for the plaintiffs-respondents took a preliminary objection to the maintainability of the appeal by the Government of the United Provinces. He contended that there was no decree in this case against that Government, that the Government was not aggrieved or affected by the decree of the High Court and that it accordingly had no *locus standi* to prefer the appeal. Though section 205 of the Constitution Act provides in general terms that "any party" in the case may appeal to the Federal Court, the learned counsel maintained that these general words must be limited in the manner in which section 96, Civil Procedure Code, has been limited and he argued that the mere fact that the United Provinces Government had been formally impleaded as a party in the second appeal would not give it a right to appeal to this Court. He further said that where a person who ought not to have been impleaded had been improperly added

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as a party by the court, such person should not be regarded as a party competent to prefer an appeal and he insisted that on the admitted facts of the case the order of the High Court impleading the United Provinces Government as a party to the second appeal should be held to be unwarranted and without jurisdiction. In support of his contention that the United Provinces Government should not have been added as a party, he relied on the observations of a learned Judge of the Madras High Court in *Sri Mahant Prayaga Doss* v. *Board of Commissioners for Hindu Religious Endowments, Madras* (1), and of the Court of Appeal in England in *Moser* v. *Marsden* (2). He invited attention to the fact that even the allegations made in support of the petition filed in the High Court to join the United Provinces Government as a party did not attempt to bring the case within Order I, Rule 10, Civil Procedure Code, or suggest that the Government was at least a "proper" (if not "necessary") party to the proceeding and he contended that the alleged desire or intention of the Government to take the case on appeal to the Federal Court which was all that was set out in the petition was no ground for impleading it as a party. The learned Advocate-General of the United Provinces relied on the circumstance that his petition was not opposed before the High Court; to this, the learned counsel for the plaintiffs replied that even if the absence of opposition should be held to amount to consent, such consent could not cure a defect of jurisdiction and that such consent would not in any event give the United Provinces Government a right of appeal which it did not otherwise possess.

I am free to admit the force of some of these contentions. The circumstance that some of the observations in *Sri Mahant Prayaga Doss* v. *Board of Commissioners for Hindu Religious Endowments, Madras* (1), have been doubted by another learned Judge of the same court in *Secretary of State* v. *Murugesa Mudaliar* (3), does not seem to me to carry Dr. Asthana very far. Again, it is true that in *Jaimala Kunwar* v. *Collector of Saharanpur* (4), the court observed that the power to add parties had not always been limited to cases falling within the language of Order I, rule 10, Civil Procedure Code; but an examination of the facts of that case and of the decisions referred to in that judgment will show that in these cases, the person added was not really a third party but one who on some recognised principle would be bound by the result of the litigation. In *Moser* v. *Marsden*(2), the Court of Appeal (in

(1) (1926) I. L. R. 50 Mad. 34.
(2) [1892)] 1. Ch. 487.
(3) A. I. R. (1929) Mad. 443.
(4) (1933) I. L. R. 55 All. 825.

reversal of the Trial Court's order) dismissed the application of the third party, even while recognising that that party might be "indirectly" affected by the result of the case. The allegation made in support of the petition in that case was that the defendant on record "will not contest the case properly" and yet Kay L. J. was content to answer "we cannot help that". It however appears to me that in a case like the present, it will not be right to regard the State as standing *for all purposes* on the same footing as a private third party. Its character as the guardian of the public interests cannot be ignored and it will not be right to limit its *interest* in a litigation strictly to cases in which its pecuniary or proprietary interests or the interests of the public revenue are involved.

In most of the Indian decisions bearing on the question of joinder of parties, the discussion has had to proceed within the limits imposed by the language of the relevant statutory provisions which were in the main intended to deal with private parties. The position of the King as *parens patriae* has long been recognised in this country; but the extent to which the King's law officer is entitled to initiate or intervene in proceedings in courts "to see that justice is done to every part of the King's subjects". (as it is expressed in the old English authorities) has never been clearly or sufficiently defined. As early as in 53 Geo. III, Chapter 155, provision was made authorising the Advocate-General in this country to take such proceedings as His Majesty's Attorney-General may take in the Courts of Equity in England (section III). This section was at one time interpreted by the Supreme Court in Madras as authorising the Advocate-General to represent the Crown only in cases involving the pecuniary interests of the Crown. But this narrow interpretation was not endorsed by the Judicial Committee [See *Attorney-General* v. *Brodie* (1), a case relating to a charity]. The section was reproduced in successive Government of India Acts up to 1919 (see section 114 of the Government of India Act of 1919); but in the Act of 1935 neither section 16 nor section 55 follows the same lines. Barring sections 91 and 92 of the Civil Procedure Code of 1908 relating to public nuisances and charities and special provisions like section 26 of the Patents and Designs Act, 1911, and section 39 of the Lunacy Act, 1912, there are at present no specific provisions in the Indian statute book empowering the Advocate-General to institute or intervene in any proceedings in the Civil Courts. And it cannot even be

(1) (1846) 4 Moo. I. A. 190.

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said that a well-defined course of practice has grown up as to the cases or circumstances in which the Advocate-General is entitled to intervene or to be impleaded as a party, apart from his representing the Crown or the Secretary of State in suits in which either the Crown or the Secretary of State happens to be a party. Even in England, the distinction between cases in which the Attorney-General figures as a party and cases in which he only intervenes or is merely heard does not appear to be very clearly marked. The Indian Procedure Code does not contemplate the Advocate-General "intervening" without himself or the Secretary of State being a party to the suit. The result is that even in proceedings similar to those in which the Attorney-General will merely intervene, according to the English or the Dominion practice, the same result has to be attained in this country by impleading the Government as a party. The new Constitution Act (taken with the adaptation of Section 79 of the Civil Procedure Code) has introduced a further complication as a result of the provision that in suits by or against the Crown, the Governor-General should be named as the plaintiff or the defendant in certain cases, that in certain other cases the Provinces should be so named, and that in a third group of cases the Secretary of State's name should be stated. But in whatever form the cause title may run, the theory is that the Crown is the party. It may be added that even when the Attorney-General figures as the party in England the theory is that the Crown is a party to the litigation through him [see *Att.-Gen.* v. *Logan* (1) and *Att.-Gen.* v. *Cockermouth Local Board* (2)]. Such being the state of the law and of precedents as to the position of the Government in this country or the Advocate-General in relation to proceedings in Courts, it seems to me that when a question like the present one is raised, it must be decided on broad grounds of justice and convenience and not merely as turning on the interpretation of a particular rule in the Civil Procedure Code.

If the practice in England is to be treated as affording any guidance here, it may be useful to refer to two instances. In *Ellis* v. *Duke of Bedford* (3), the Court of Appeal directed the Attorney-General to be added as a party defendant to an action in which certain plaintiffs sued on behalf of themselves and of other growers of fruit, flowers, vegetables, etc., to enforce certain

(1) [1891] 2 Q. B. 100 (106).
(2) [1874] L. R. 18 Eq. 172 (176)
(3) [1899] 1 Ch. 494.

preferential rights to stand in the Covent Garden market. The Lord of the market was the sole original defendant. The action did not relate to a charity nor did it arise out of a public nuisance. The Court of Appeal nevertheless held that the Attorney-General must be before the Court "to represent the public as against the alleged preferential rights of the growers." This direction was referred to with approval by the Judicial Committee in *Esquimalt and Nanaimo Rly. Co. v. Wilson* (1). *In re Chamberlain's Settlement* (2), P. O. Lawrence, J. directed the addition of the Attorney-General as a party to a proceeding in which the point for decision was whether a tenant for life had forfeited his interests under a particular settlement by reason of his having become a "German National" within the meaning of the Peace Treaty Order of 1919. The tenant for life objected to the addition of the Attorney-General, but the learned Judge overruled the objection, not merely on the ground that the interpretation of the Treaty was a matter which concerned the Crown but also on the ground that the question raised was one "which may affect a large section of the British public." I find it difficult to say whether and if so how the same course could have been adopted by a Court governed by the Civil Procedure Code in this country and whether according to the processual law obtaining in this country the Government or the Advocate-General will be the proper party to be impleaded, if the principle of the above decision is to be followed here. A decision of a learned Judge of the Calcuttta High Court seems apposite here. *In the goods of Bholanath Pal, deceased* (3), the Advocate-General sought to intervene on behalf of the Secretary of State in a Succession Certificate Proceeding with a view to contend that the High Court on its original side could only grant letters of administration but not a succession certificate. It is possible to suggest that the interests of Government revenue were concerned here, because on the issue of letters of administration succession duty might be payable on the whole estate whereas a succession certificate could be limited to particular debts and the duty payable to Government correspondingly reduced. But the learned Judge (Remfry, J.) did not merely hear the Advocate-General on the question of jurisdiction or court fee, but added the Secretary of State as a party. The very circumstance that in the present case the High Court thought it proper to issue notice to the Provincial

(1) [1920] A. C. 358.
(2) [1921] 2 Ch. 533.
(3) (1930) I. L. R. 58 Calc. 801.

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Government involves a recognition of the fact that the Government was *interested* in the question raised—presumably as representing the large class of subjects for whose benefit the Act was intended—though its interest may be limited to the general question *viz.*, the validity of the enactment. There was also the fact that the remission whose legality was in question had been granted under the orders of the Provincial Government.

It is not however necessary for me to consider at this stage what this Court should do if it had in the first instance to deal with the application made by the United Provinces Government to the High Court in this case ; nor does it seem to me useful to speculate what the High Court itself would have done if the application of the United Provinces Government to be joined as a party had been opposed by the plaintiffs. I am not prepared to go so far as to ignore the fact that the High Court has impleaded the United Provinces Government and that this course has been adopted with the consent (express or implied) of the plaintiffs. In my opinion, there is no case here of a defect of jurisdiction in the sense in which it is said that consent cannot cure a defect of jurisdiction. It is true that in *Moser* v. *Marsden* (1), Lindley L. J. observed that the question was not one of "discretion but of jurisdiction". But as the antithesis shows, the learned L. J. apparently had in mind the difference between the decision of the question of joinder on the interpretation of a rule of law and a direction given by the lower court in the exercise of its discretion, because in the latter case the Court of Appeal would generally be reluctant to interfere. It may even be regarded as a case of excess of jurisdiction within the meaning of section 115 of the Civil Procedure Code, but that will not make the order *void* in the sense that it may be ignored or treated as if it had never been passed. In *Sri Mahant Prayaga Doss* v. *Board of Commissioners for Hindu Religious Endowments Madras* (2), the learned Judge intimated that but for the opposition of the plaintiff he might have directed the addition of the Secretary of State as a party.

To the suggestion that the expression "any party" in section 205 (2) of the Constitution Act must be limited on the lines on which the generality of the language of section 96, Civil Procedure Code, has been limited by decisions, the answer is furnished by the difference in language between the two provisions. Section

(1) [1892] I. Ch. 487.

(2) (1926) I. L. R. 50 Mad. 34.

96, Civil Procedure Code, does not in terms say who is entitled to prefer an appeal. But according to the Code it is the "decree" that has to be appealed against. The decisions have therefore laid it down as a matter of inference that a party *adversely affected by the decree* is the only person entitled to appeal. It was however realised that a rule so limited might cause hardship in some cases. An extension was therefore made by conceding a right of appeal to a party who might be bound by a finding in the judgment, though there was no decree against him (see the cases reviewed in *Harachandra Das* v. *Bholanath Das* (1). Section 205 of the Constitution Act provides for an appeal "from any judgment, decree or final order"—an expression which has received varying interpretations—and sub-section (2) of the section enacts that "any party in the case may appeal". Why should this express provision be qualified by adding the words *if adversely affected by the decree ?* It may be taken as a matter of "common sense that there can and will be no appeal when there is nothing to appeal about" [See *Goldar* v. *Saha* (2)]. But why limit the grievance to a grievance about the decree ? Even on the footing that the general language of section 205 (2) may or must be limited in some manner, it seems to me that its scope ought not to be unduly narrowed so far as the Government (whether Central or Provincial) in this country is concerned. The section is principally concerned with the determination of constitutional questions though arising in a litigation between private parties. The Government stands in a peculiar situation : it has no doubt pecuniary or proprietary interests in one sense, but in another aspect it is also the custodian and the protector of the interests of the public ; and the question of the legality of a statute is one in which it has a special interest. It is in view of this consideration that this Court has in Order XXXVI of its Rules provided for notice of any proceedings being given to the Advocate-General of India or to the Advocates-General of the Provinces and for applications being made by them to be heard in any proceedings before this Court. Both on principle and as a matter of expediency, it seems to me very undesirable to place the Government in this embarrassing position, that while it must deem itself bound by an opinion expressed by the High Court as to the invalidity of a statute, it must find ways of persuading private parties formally to file an appeal, if it desires to have the constitutional question brought

(1) (1935) I. L. R. 62 Calc. 701.
(2) (1905) 9 C. W. N. 584, (588).

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up before this Court. The procedure under section 213 of the Constitution Act may not be found appropriate when the question of the legality of a statute has actually been put in issue before a court of law in a litigation between private parties.

I have already stated that the Indian Civil Procedure Code does not contemplate an "intervention" by the Advocate-General as distinguished from an addition of the Advocate-General or the Government as a party. When either of them has been impleaded as a party with a view to give them a hearing, it seems to me that the Court would fail to give full effect to the language of section 205 (2) of the Constitution Act if it should hold that notwithstanding such joinder as a party, the Advocate-General or the Government had no right to prefer an appeal. In proceedings relating to charities, it has been held that where the Advocate-General is a party, he is the proper person to appeal against an adverse judgment [see *Jan Mahomed* v. *Syed Nurudin* (1), following *Attorney*-General v. *Wright* (2), see also *In re Rai Rukhiabai* (3), where the learned Judges took the additional ground that the beneficiary, though he was heard by counsel, was not to be treated as a *party*]. I see no reason why the principle should be different in a case like the present. Neither in the one case nor in the other has the Advocate-General or the Crown or the State any pecuniary or proprietary interest if that is to be the sole test. The right of appeal being a creature of the statute, the right of one who is within the terms of the statute cannot, it seems to me, reasonably be denied when even on the broader ground of interest in the litigation, it is conceded that he is sufficiently interested to justify his claim to be heard. In *John Deere Plow Co.* v. *Wharton* (4), the parties concerned had themselves preferred an appeal to the Judicial Committee and the Attorneys-General of Canada and British Columbia seem to have intervened before the Judicial Committee. The case therefore throws no light on the question of the right of the Attorney-General of the Dominion to prefer an appeal in a case where he had intervened even in the lower court. The report of the decision in *Attorney-General for Alberta (Intervenant)* v. *Kazakewich* (5), referred to in my Lord's judgment is very brief and it does not appear whether the decision was based on the language of any statute and if so what that language was. For the reasons set forth above, I would overrule the preliminary objection.

(1) (1907) I. L. R. 32 Bom. 155. (2) (1841) 3 Beav. 447.
(3) [1937] I. L. R. Bom. 425. (4) [1915] A. C. 330.
(5) [1937] Can. S. C. R. 427.

There is another aspect of the case which also deserves consideration in this connection. The application filed by the United Provinces Government in the High Court put the plaintiffs on notice that that Government sought to come in as a party for the very purpose of placing itself in a position to prefer an appeal to this Court. If the plaintiffs had opposed the petition, the Government might have taken steps to ensure that an appeal was formally lodged by the original contesting defendant. This opportunity has now been lost to that Government and this is in a large measure attributable to the attitude taken by the plaintiffs towards the application in the High Court. This may not create an estoppel nor suffice to confer on the Government a right of appeal which it would not otherwise possess. But if the Government can bring itself within the letter of the law, one need not hesitate to uphold its right to prefer an appeal in such circumstances.

Proceeding now to the question of the invalidity of the impugned Act, it will be convenient to take up first the ground on which all the learned Judges of the Full Bench of the High Court agreed, namely, the objection based on Section 292 of the Constitution Act. As I understand the argument, this objection interprets Section 292 not merely as enacting that the law in force in British India immediately before the commencement of Part III of the Constitution Act shall continue in force notwithstanding the repeal of the earlier Government of India Act, but as also fixing a time-limit up to which the operation of such law should not be disturbed by anything contained in any enactment that may come to be passed by any of the legislatures in British India. It was conceded before us and it was recognised before the High Court that a provision like Section 292 is usually inserted in similar Acts, to indicate that the repeal of the parent Act shall not be deemed to have repealed all the laws passed under that Act. (Compare Section 108 of the Commonwealth of Australia Constitution Act, Section 129 of the British North America Act and Section 135 of the Union of South Africa Act). But laying special stress on the words "until altered or repealed or amended" the learned counsel for the plaintiffs desired to read Section 292 as containing a direction by Parliament that the law then in force must in any event continue up to a specified date, namely, the date of its alteration, repeal or amendment by a later Act of the Ligislatures in India; and, it was sought to be inferred therefrom that no later Act of such Legislatures can by words of retrospec-

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tive operation antedate its effect so as to affect rights acquired under a previous law down to the date of the new legislation. At one stage, the learned counsel for the plaintiffs even went so far as to suggest that the Legislatures in India had been deprived by this provision of the power of enacting *at any time* laws with retrospective effect, or they were at least incompetent to extend the retrospective operation of their enactments to a period anterior to the 1st of April, 1937, when the Constitution Act came into operation in the provinces. These arguments were however not persisted in, when it was pointed out that the Indian Legislatures were, within the statutory limits assigned to them, bodies possessing plenary powers [see *The Queen* v. *Burah* (1); *Hodge* v. *The Queen* (2) and *Croft* v. *Dunphy* (3)] and that whatever might be the objection on grounds of reasonableness or expediency to retrospective legislation, there was nothing in Section 292 to deprive the Indian Legislatures of this particular incident of plenary legislative power, [Compare *Phillips* v. *Eyre* (4) relating to an Act of the Jamaica Legislature; and *The King* v. *Kidman* (5), relating to an Act of the Commonwealth Parliament in Australia.] The objection was then limited to the power of the legislature to give retrospective operation to an enactment when, by so doing, it would prevent a law in existence at the date of the commencement of Part III of the Constitution Act from having its full effect up to the date of the repealing or amending Act. It was pointed out that the language employed in Section 292 of the Constitution Act was not identical with that to be found in the corresponding provisions in the British North America Act or in the Commonwealth of Australia Act. But it would appear that this language is so similar to that found in Section 135 of the Union of South Africa Act as to suggest that it might have been taken from it. The reason for a provision like that contained in Section 292 being the one already stated, it does not seem to me necessary or proper to lay undue stress on the word "until" used in Section 292 and hold that the policy of this provision is different from that underlying similar provisions in the other Constitution Acts above referred to. I see no justification for drawing a distinction between the statement that the previous

(1) (1178) 3 App. Cas. 889; L. R. 5 I. A. 178; I. L. R. 4 Calc. 172.
(2) (1883) 9 App. Cas. 117 (132).
(3) [1933] A. C. 156.
(4) (1870) L. R. 6 Q. B. 1 (23-27).
(5) (1915) 20 Com. L. R. 425.

law shall continue in force *subject* to repeal or amendment by later legislation and the statement that it shall continue in force *until* repealed or amended by later legislation. That Parliament might have had some reason or motive for denying to the Indian Legislatures the power of retrospective legislation with reference to pre-existing laws seems to me to rest on mere speculation and is not a fair inference from the language used in the section.

In the judgments delivered by the learned Judges of the Full Bench of the Allahabad High Court. I find it stated in some places that Section 2 of the impugned Act in effect repealed Section 73 of the Act of 1926 with retrospective effect or that the provisions of the two Acts were diametrically opposed to each other. With all respect, I find some difficulty in following this view. It is true that the remission which the impugned Act sought to regularise was not one made in conformity with the provisions of S. 73 of the Act of 1926. But such regularisation would only mean the *addition* of a *new* head of remission; it may amount to an alteration or amendment of the old Act, but will not necessarily involve a repeal of S. 73 of that Act. The co-existence of two kinds of remission given for different reasons is not inconceivable or impossible. It can of course be said that the impugned Act retrospectively deprived landlords of a share of the rent to which they had already acquired a right. But if on general principles a Legislature has ordinarily power—for reasons which it is not open to the court to investigate—to enact measures which by retrospective operation may deprive some subjects of vested rights, I see no sufficient reason for treating the present case as standing on any special footing. In this view, it will follow that there is no reason for saying (as Bajpai J. has said) that "the impugned Act has attempted to do something indirectly which it could not do directly."

Reference has been made in the judgments of the learned Judges of the High Court and reference was also made in the course of the arguments before us to the fact that a later Act of the United Provinces Legislature, namely, Act XVII of 1938 took care to repeal Sections 73 to 75 of the Agra Tenancy Act of 1926 and to add in clause (2) of s. 5 a provision corresponding to clause (2) of s. 74 of the Act of 1926, while the impugned Act contains no provision corresponding to this clause. It does not appear to me that this is any legitimate ground to be considered in the present connection. The policy of Act XVII of 1938 is apparently not the same as that of the Act of 1926, because the conditions

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and procedure stated in Section 4 of the new Act are not identical with those contemplated in Section 73 of the older Act and that affords a sufficient explanation for the repeal of Sections 73 to 75 of the old Act.

The additional ground of invalidation relied on by Iqbal Ahmad J. was also pressed before us at some length by the learned counsel for the respondent. With all respect, it seems to me there is even less force in this objection than in the one based on s. 292. The only question to be considered in this connection is whether the impugned Act can reasonably be described as one made "with respect to" any of the matters enumerated in item 21 of List II of Schedule VII of the Constitution Act. Item 2 of that List is only of secondary importance in this case, because the first part of item 2 is governed by the words "with respect to any of the matters in this List"—which takes us to item 21; and the second part, namely "procedure in rent and revenue courts" can scarcely be held to authorise legislation which in effect dealt with substantive rights, by precluding the landlord from objecting to a remission which had been improperly made under executive authority.

Both in the High Court and in the arguments before us, great stress has been laid upon the way in which section 2 of the impugned Act had been worded and it has been said that all that the Act did was to validate arbitrary executive orders. This view does not seem to me to take the whole of section 2 into account and give due effect to the substance of the enactment. The Preamble recites the necessity for regularising certain remissions of rent and even if we are to exclude the Preamble from our consideration, section 2 in terms refers to the fact of remission of rent having been made under orders of the Provincial Government by reason of the fall in the prices of agricultural produce which took place before the commencement of the Act. The succeeding words can as a matter of grammar only mean that the order of remission thus passed shall not be called in question. There can thus be little doubt that the Act intended to deal and does deal with the subject of remission of rent made under orders of the Provincial Government. It can make no difference for the present purpose whether it laid down general provisions for remission of rent for all time or dealt with the remission made or to be made in particular years. The subject-matter in every one of these cases must be held to be remission of rent.

A point was raised in the course of the discussion before us,

whether the words "such order" in section 2 of Act XIV of 1938 referred to the order of the Provincial Government authorising the remission in general terms or to the consequent orders passed by revenue officers fixing the remission in the case of each individual or holding. I am inclined to think that the reference must be to the order passed by the revenue officers with reference to individual holdings and the reference to the order of the Provincial Government is only to indicate the authority under which the remission was granted. This is to some extent supported by the reference in the proviso to remissions "in excess of the remission ordered for the same holding", etc. But this again is immaterial, so far as the question of the subject-matter of the Act is concerned. Whether it is the order of the Provincial Government or the consequent order of the revenue officer, the order was one which related to remission of rent and that is the subject-matter of the Act. It was pointed out that the section did not in terms purport to validate the remission, and it was argued that an Act which merely protected from attack an order which granted the remission could not be said to be an Act dealing with remission. This seems to me an unsubstantial distinction. Whatever consequences might flow from the absence of a direct provision validating the remission or precluding the landlord from recovering the remitted rent, the avowed purpose of the Act was to ensure that the tenants had the benefit of the remissions which had been made.

A point was made by the learned counsel for the respondents that section 100 of the Constitution Act used the expression "with respect to any of the matters enumerated in the List" and not words like "relating to the matters enumerated in the List". It seems to me that the words "with respect" are not by any means less comprehensive than the words "relating to". [*Cf.* observations in *The King* v. *Kidman* (1); Wynes: Legislative and Executive Powers in Australia, at pp. 28, 29]. The significance of these expressions may become important in a case where the impugned legislation contains a number of provisions relating to different matters and a question arises as to whether one set of provisions can be described as "passed in respect of a forbidden subject" or can be considered as only incidentally affecting such a subject while forming part of an Act which in the main deals with an authorised subject (see the antithesis indicated by Lord

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Atkin in *Gallagher* v. *Lynn* (1), with reference to the use of the expression "in respect of" in section 4 of the Government of Ireland Act). In the present case, the Act in question deals with only one matter and the distinction between what is "substantial" and what is only "incidental" does not arise for consideration.

In coming to the conclusion that the impugned Act did not fall within any of the heads enumerated in item 21 of List II, Iqbal Ahmad J. gave it as one of his reasons that that item could only cover provisions of "substantive law" and that the impugned Act did not embody any provision of substantive law either in respect of rights over land or land tenures or the relation of landlord and tenant or the collection of rent. The fact that the provision is couched in the form of an immunity of the remission order from attack in a civil or revenue court will not, I think, take away from its character as one depriving the landlord of his right to the full rent. It is well settled that the substance of the legislation has to be examined to see what the Legislature was doing, and the form which the statute may have assumed under the hand of the draftsman is not decisive. As explained by Dr. Asthana, it might have been thought sufficient to frame the new Act on the lines of clause (1) of section 74 of the Tenancy Act of 1926. The learned Judge enumerated certain provisions which he would regard as provisions relating to the "collection of rents". But I do not see why the List given by the learned Judge should be regarded as exhausting all conceivable provisions relating to that head. Section 2 of the impugned Act had a two-fold operation; on the one hand it prevented the landlord from questioning the order of remission with a view to recovering the full rent, on the other, it might also be held to prevent the court *suo motu* from questioning the order of remission. In the latter sense, it might be said to be an interference with the power of the court and it is in answer to such a possible contention that reliance seems to have been placed on behalf of the Government on item 2 of List II.

One or two other objections were mentioned in the course of the argument, but I did not gather that they were seriously meant to be urged. In the result, I am of opinion that the impugned Act was within the sphere allotted to the Provincial Legislature by the Constitution Act, that it was not opposed to section 292 of that Act and that it was *intra vires* the United Provinces Legislature.

(1) [1937] A. C. 863.

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The question still remains what is the decree to be passed in the case, in the view that the impugned Act was valid. The conclusion of the High Court against the validity of the Act will no longer hold good, but will that constitute sufficient reason for modifying the decree of the High Court so far as it relates to the rights of the original parties? According to my reasoning in the earlier portion of this judgment, the United Provinces Government was interested only in the general question and had no other interest in the particular litigation. *In the goods of Bholanath Pal, deceased* (1), the learned Judge limited the Advocate-General's argument to the question of jurisdiction which alone, he considered was one of public importance. The contesting defendant in the present case does not seem to me to be entitled to ask for a modification of the decree on the principle of Order 41 rule 4, Civil Procedure Code because there is no "decree" in this case against the Government and hence there can be no question of a decree proceeding "on a ground common to all the defendants". The anomalous situation of a decree passed against several defendants on the same ground being reversed as against some and being allowed to stand as against the rest will not arise in this case. Further the power recognised by this rule as also the one referred to in Order 41, rule 33 Civil Procedure Code, is only discretionary and the present case is not in my opinion one in which any discretionary power ought to be exercised in favour of the contesting defendant. He has not merely acquiesced in the decree of the High Court, he has not even appeared before this Court to explain the circumstances in which he did not choose to appeal nor to ask for its modification. This is significant in view of the suggestion thrown out by Dr. Asthana that the original parties to the litigation have in all probability come to a settlement. I am accordingly of opinion that notwithstanding this Court's acceptance of the appellant's contention as to the validity of the impugned Act, there is no justification for disturbing the decree passed by the High Court in the case.

Two more contentions of the learned counsel for the respondents remain to be noticed. It was argued that Act XIV of 1938, even if valid, would not preclude the plaintiffs in this case from recovering the full rent due to them, because the Act had not been made applicable to pending actions. There can be little doubt that there is a well-recognised presumption against constru-

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ing an enactment as governing the rights of the parties to a pending action. *Moon* v. *Durden* (1) is an instance of the extreme limits to which this rule has been carried; for notwithstanding the doubt felt by Baron Parke in that case that the denial of the application of the Act to pending actions would render inoperative the words " or maintained" used in the Act, the Court thought it safer not to apply the statute to pending actions. The Act not under consideration was clearly intended to be retrospective, in so far as it took away certain vested rights which had accrued before the date of its enactment. But the presumption against retrospective operation is said to be so strong that it has been recognised that even in construing an Act or a section which is to a certain extent retrospective, it ought not to be given a larger retrospective operation than the words clearly involve [see *Reid* v. *Reid* (2)]. There are two recognised principles, (1) that vested rights should not be presumed to be affected and (2) that the rights of the parties to an action should ordinarily be determined in accordance with the law as it stood at the date of the commencement of the action. The language used in an enactment may be sufficient to rebut the first presumption, but not the second. Where it is intended to make a new law applicable even to pending actions, it is common to find the legislature using language expressly referring to pending actions. But it will be seen from the decision of the Privy Council in *K. C. Mukherjee* v. *Mst. Ram Ratan Kuer* (3) that it is not necessary that the intention of the Legislature should always be expressed in that particular form. In that case, the enactment validated all transactions subsequent to a *specified* date and their Lordships held that the new law would apply to a transaction of that kind even it it had become the subject of an action prior to the date of the passing of the Act; and in those circumstances, they reversed the usual presumption and looked to see whether there was any reservation in the Act in respect of pending actions. The question of the applicability of the impugned Act to pending actions is likely to arise only, in a few cases and whatever may be its importance to the parties to those cases, it does not seem to me to be a matter in which the United Provinces Government can be said to be interested. As I have already indicated that as between the original parties to this suit there is no justi-

(1) (1848) 2 Ex. 23.

(2) (1886) 31 Ch. D. 402.

(3) (1935) I. L. R. 15 Pat. 268; L. R. 63 I. A. 47; 62 C. L. J. 419.

fication for this Court's interference with the decree of the High Court, I do not find it necessary to express any definite opinion on the question of the extent to which the impugned Act operates retrospectively. For the same reason, I refrain from expressing any opinion on the argument urged by the learned counsel for the respondents, as to the effect of the absence from the impugned Act of a clause corresponding to Section 74(2) of the Agra Tenancy Act, 1926, and Section 5(2) of Act XVII of 1938. He argued that it might be that the impugned Act prevented the order of remission being questioned in a Court, but this would not of itself take away the contractual right of the landlord to the full rent or absolve the tenant from liability for the full amount of the stipulated rent. This again is a question relating to the construction of the Act and does not bear upon the question of its validity; and as it has not been raised or discussed before the High Court, I prefer to leave it alone, as I have held that this appeal should be dismissed for another reason. I agree that that there should be no order as to the costs of this appeal.

A. T. M. *Appeal by the Province allowed but the decree of High Court allowed to stand.*

CRIMINAL REVISION.

Before Mr. Justice T. J. Y. Roxburgh.

FAKIR MAHAMMAD

v.

THE KING-EMPEROR.*

CRIMINAL.
1940.
September, 3.

Jurisdiction—Bengal Excise Act (V B. C. of 1909), Sec. 83(b)—Police officer authorised to submit a report after investigation.

A Police officer, who was authorised by the Collector of Excise to investigate a case of keeping a licensed premises open after hours and to submit a report to the Magistrate under section 83 (b) of the Bengal Excise Act, 1909, does not come under the description of "an Excise officer authorised by the Collector in this behalf" in the said section.

Applications for Revision under section 439 of the Code of Criminal Procedure by the Accused.

*Criminal Revision Cases Nos. 784 and 785 of 1940, against the order of H. B. Lethbridge Esq., Sessions Judge of the 24 Parganas, dated the 17th May, 1940, affirming that of H. H. Nomani Esq., Police Magistrate of Sealdah, dated the 12th March, 1940.

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The accused were convicted under section 54 (b) of the Bengal Excise Act, 1909, for keeping a licensed premises open after hours.

The material facts appear from the judgment.

Messrs. S. C. Taluqdar and *Kiran Mohan Sarkar* for the Accused.

Mr. Hamidul Huq for the Crown.

The following judgment was delivered :

September, 3.

In these two cases the two accused have been convicted under section 54 (b) of the Bengal Excise Act, 1909, for keeping a licensed premises open after hours. The proceedings arose out of searches by the police during which no excise officer was present. The matters were reported to the Collector of Excise who wrote to the Deputy Commissioner of Police, North District, on the 24th November, 1939, saying that he sanctioned the prosecution of the two accused and that he authorised an officer of the Police Department to investigate the cases and to submit a report to the Magistrate under section 83 (b) of the said Act. The accused in each case have been fined Rs. 60.

These Rules have been issued on the ground that there has been no complaint or report by the Collector of Excise or any Excise Officer authorised by him as required by section 83 (b) of the Excise Act, and that therefore the Police Magistrate who tried the cases had no jurisdiction to take cognisance of the offences and the entire proceedings are wholly *ultra vires.*

In my opinion the Rules must be made absolute. It appears that the Magistrate took cognisance in each case on a challan submitted by the Inspector of Police, Beliagatta Police Station. He never saw the letter of the Collector of Excise dated the 24th November until this was exhibited in the proceedings in the following February. Even if by any stretch it could be contended that this letter amounted in itself to a complaint or report as described in section 83 (b) of the Excise Act it is quite certain that the Trying Magistrate did not take cognisance on such complaint or report. It cannot be said that the Police Officer who filed the challan of which cognisance was taken answers to the description required by section 83, namely, "an Excise Officer authorised by the Collector in this behalf". In the circumstances I must hold that the whole proceedings in each of the cases are void. The convictions and sentences are, therefore, set aside.

It will be open to the Excise Department to proceed properly according to law if they are so advised.

A. T. M. *Rules made absolute.*